Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity,

Petitioners,

v.

DAVID GENZLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a suit for damages against a state prosecutor under 42 United States Code section 1983, does prosecutorial immunity protect the prosecutor against allegations that he coached an eyewitness to lie in court?

2. In a federal summary judgment motion, evidence is construed in the light most favorable to the non-moving party. When that evidence includes a final, judicially-undisturbed State appellate adjudication affirming the non-moving party's criminal conviction, may the federal court ignore unfavorable parts of the State adjudication?

PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner San Diego County District Attorney's Office respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on June 7, 2005.

CITATION OF OPINIONS

In a published Opinion, the Ninth Circuit Court of Appeals rejected defenses of absolute quasi-judicial (prosecutorial) immunity for a State court prosecutor and his investigator, against a convicted offender's civil rights claim that the prosecutor "suborned perjury . . . in order to secure a conviction." *Genzler v. Longanbach*, 410 F.3d 630, 635 (9th Cir. 2005). The challenged Opinion is reproduced in the Appendix.

In an earlier unpublished Opinion, the California Court of Appeal affirmed the offender's criminal convictions, based in part on that court's rejection of the same prosecutorial misconduct theory asserted by the offender in his federal lawsuit. That State Opinion is final, and is judicially undisturbed. It is also reproduced in the appendix, and can be found on LEXIS as *People v. Genzler*, 2002 Cal.App. Unpub. LEXIS 99 (2002). It was part of the record below.

JURISDICTION

The initial Opinion of the Court of Appeals for the Ninth Circuit was published September 27, 2004. A timely Combined Petition for Rehearing and Suggestion for

Rehearing En Banc was denied June 7, 2005, and the initial Opinion was withdrawn, and replaced by the challenged Opinion. App. 9-10. This petition for certiorari was filed within 90 days of the publication of the challenged Opinion.

This Court's jurisdiction is invoked under 28 United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

The challenged Opinion refers to violations of federal "constitutional rights," but does not identify any specific constitutional provision.[1]

42 United States Code (Relevant Portion):

> §1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

[1] This Court has held that a federal right must be identified before denying qualified immunity, but has not adopted such a rule for absolute immunity.

Federal Rules of Civil Procedure (Relevant Portion):

Rule 56. Summary Judgment

. . . .

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Respondent (plaintiff below) is David Genzler. He was tried twice, and convicted twice, of feloniously killing one victim (Dustin Harless) by stabbing him in a fight, and feloniously assaulting another victim (Scott Davis) with the fatal knife. (The events occurred on April 18, 1996.)

Genzler sues the prosecutor (ex-Deputy District Attorney Peter Longanbach), his investigator (District Attorney Investigator Jeffrey O'Brien), and their supervisors up the

prosecutorial chain of command (ex-District Attorney Paul Pfingst and the other petitioners) for money damages under 42 United States Code section 1983, alleging that unethical prosecutorial acts led to the first conviction.

Mr. Genzler's arrest by police was concededly based on probable cause. *Genzler*, 410 F.3d at 639. The first jury convicted him of Mr. Harless' murder and Mr. Davis' aggravated assault, but that conviction was reversed. The second jury convicted him of Mr. Harless' manslaughter and Mr. Davis' aggravated assault. That conviction was affirmed. Mr. Genzler's convictions for assaulting Mr. Davis are not mentioned in the challenged Opinion, though the final State opinion was part of the record on appeal. *Genzler*, 410 F.3d at 632; App. 48.

Mr. Genzler fled the scene of his crimes, but two persons, assault victim Davis and Sky Flanders, gave police videotaped statements. About a week later, Ms. Flanders had her first meeting with the prosecutor's investigator. Some time later, she met with the prosecutor and his investigator together. The challenged Opinion explained what happened:

> After these meetings, Flanders changed her story. She testified at the preliminary hearing on May 23 and at both trials that she remembered little of the actual fight because she was distracted by the arrival of Scott Davis.

Genzler, 410 F.3d at 634.

The challenged Opinion described Genzler's version of events:

> According to Genzler's version of events, the fight on April 18 began when Harless charged Genzler

> and punched him in the face. Genzler said that Harless had grabbed him, slammed his face to the ground and pinned his arm, and that Davis then began kicking him in the head. Genzler said that he stabbed Harless to defend himself from the attack.

It also described Ms. Flanders' initial police statement:

> As Flanders described the events to police that day, Genzler got out of the car, Harless and Genzler exchanged punches, Harless "flipped" Genzler to the ground, and Genzler stabbed Harless while Harless held Genzler on the ground. Flanders also told police that day that Harless was a skilled wrestler who had been involved in previous street fights. Police audio- and video-taped the interview with Flanders.

It also described Mr. Davis' initial police statement:

> In his interview with police the day after the homicide, Davis stated that he saw Genzler jump out of his car and chase Harless and Flanders as they walked away from him, hand-in-hand. This account was manifestly inconsistent with the account Flanders had given police on the day of the homicide. Davis then met with O'Brien on April 25, and changed his story. In a report summarizing this April 25 meeting, O'Brien wrote that, "upon reflection," Davis considered that he had not seen the couple walking away from him hand-in-hand. At the May 23 preliminary hearing, Davis testified that Flanders and Harless were standing several feet apart when the fight began.

Genzler, 410 F.3d at 634-635.

While the challenged Opinion summarized Mr. Genzler's version of events, it ignored the facts adjudicated in the State Opinion in his criminal case. Pertinent parts could not be construed in a light favorable to Mr. Genzler. For example, the challenged Opinion ignores this part of the State Opinion:

> We believe the jury's rejection of Genzler's self-defense claim was not due to any misconduct occurring before or during the first trial but was because Genzler's claim that Harless was gouging his eye and Davis was kicking his head and arm were inconsistent with the physical evidence, i.e., the evidence overwhelmingly established Genzler did not suffer any injuries consistent with his claims. Genzler's conviction of involuntary manslaughter was the least possible offense under the circumstances of the case. We do not see any reasonable possibility, given the facts of this case, that the jury would have acquitted Genzler of any and all wrongdoing even if the asserted prosecutorial misconduct had not occurred. It is clear the jury's verdict was based on the evidence properly presented at the retrial and was not the result of any taint flowing from misconduct relating to the first trial.

App. 67.

The challenged Opinion holds that the prosecutor and his investigator were not individually entitled to prosecutorial immunity because, construing the evidence in the light most favorable to Genzler, there was a genuine issue of material fact about whether they were performing

advocacy functions, as opposed to police-type investigative work.[2] *Genzler*, 410 F.3d at 633.

REASONS FOR GRANTING THE WRIT

A. Importance.

This is the first case to deny prosecutorial immunity to an individual prosecutor for allegedly suborning eyewitness perjury "in order to secure a conviction." *Genzler*, 410 F.3d at 635. It is also the first case to deny prosecutorial immunity to a prosecutor for acts expressly found to be "in some degree related to trial preparation, even when viewed in the light most favorable to Genzler." *Genzler*, 410 F.3d at 643.

This is also the first case to deny a prosecutor's summary judgment immunity motion by ignoring the offender's final State adjudication, despite its judicial pedigree. (The challenged Opinion does not acknowledge ignoring anything.) See *Genzler*, 410 F.3d at 636.

The San Diego County District Attorney's Office (petitioner) has an interest in overturning the challenged Opinion. It will cause prosecutorial resources to be diverted to defending derivative civil lawsuits by convicted offenders, rather than to its true function of initiating and presenting criminal cases in court. Section 1983 lawsuits accusing prosecutors of misconduct should not be platforms for convicted offenders to relitigate facts that were litigated in criminal court before they were convicted.

[2] The Opinion ruled that *Heck v. Humphrey*, 512 U.S. 477 (1994) was inapplicable to Genzler's first conviction. *Genzler*, 410 F.3d at 635.

Such offenders could unfairly win damages and attorneys' fees if prosecutors cannot locate victims and witnesses from long-ago trials to re-prove facts thought to have been proved beyond a reasonable doubt.

The challenged Opinion negates prosecutorial immunity for the benefit of any former criminal defendant willing to allege that a State prosecutor acted unethically while preparing for trial. Prosecutors do their trial preparation outside the courtroom. The challenged Opinion effectively abolishes prosecutorial immunity for a State prosecutor's trial preparation activities.

B. Why the Challenged Opinion Sets Bad Precedent.

The challenged Opinion focuses on whether coaching witnesses to lie in court is like the function of a police officer, or like the function of an advocate, comparing such activity to "manufacturing evidence." *Genzler*, 410 F.3d at 643. That is a troubling way to frame the issue, because neither police nor prosecutors should be "manufacturing evidence" as part of their function. It is not fair to speak of witness preparation as "manufacturing evidence."

The Opinion asserts that "[t]he analysis of whether prosecutorial acts constitute advocacy or police-type investigative work is complicated by the fact that the Supreme Court has resisted any attempt to draw a bright-line between the two." *Genzler*, 410 F.3d at 637. In other words, the challenged Opinion blames this Court for not telling lower courts how to tell the difference between the police function and the prosecutorial function.

But this Court has taught that a prosecutor's out-of-court efforts to control presentation of a witness' testimony

is part of the prosecutor's function. This quote is an example:

> We noted in particular that **an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity because it was "fairly within [the prosecutor's] function as an advocate."** *Id.* at 430, n. 32. To be sure, *Burns* made explicit the point we had reserved in *Imbler*, 424 U.S. at 430-431, and n. 33: A prosecutor's administrative duties and those investigatory functions that do **not** relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. See *Burns*, 500 U.S. at 494-496. We have not retreated, however, from the principle that **acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial,** and which occur in the course of his role as an advocate for the State, **are entitled to the protections of absolute immunity.**

Buckley v. Fitzsimmons, 509 U.S. 259, 272-273 (1993). (Emphasis added.) The challenged Opinion cites *Buckley* (mistakenly calling it "*Buchanan*" several times), but *Buckley's* most pertinent language (as quoted) was ignored.

The challenged Opinion rejects prosecutorial immunity while acknowledging that the prosecutor's meetings with eyewitnesses "were to some degree related to trial preparation, even when viewed in the light most favorable to Genzler." *Genzler*, 410 F.3d at 643. That is a radical departure from settled law. *Buckley* teaches that prosecutorial immunity should be denied for prosecutorial acts that "do ***not*** relate" to trial preparation. *Buckley* also

teaches that prosecutorial acts that ***are*** related to trial preparation should be entitled to absolute immunity. *Buckley*, 509 U.S. at 272-273. That would naturally include prosecutorial acts that "were in some degree related to trial preparation."

The panel should have focused on whether the prosecutor had some purpose for his allegedly-unethical acts other than preparing for trial. (There was no such evidence.) Instead, the panel focused on whether the prosecutor might have encouraged eyewitnesses to lie. *Genzler*, 410 F.3d at 642. Encouraging eyewitnesses to lie is wrong, but such allegations are easy to make and hard to disprove, potentially forcing most (if not all) civil cases alleging ethical breaches by State prosecutors to trial. Immunity is meaningless if, as here, it can be defeated merely by demonstrating the possibility that the prosecutor acted unethically.

Under this new precedent, any former criminal defendant, regardless of conviction or acquittal, can overcome prosecutorial immunity at the summary judgment stage by demonstrating (as here) that the prosecutor met with eyewitnesses before scheduled court hearings, possibly encouraging them to lie in court. Prosecutorial immunity ought to protect a prosecutor from being sued, much less being forced to go to trial, on such subjective allegations. Prosecutorial immunity is meaningless if virtually every case filed against a prosecutor can be forced to trial.

If meeting eyewitnesses to prepare for court is the same as "manufacturing evidence," then most well-prepared trial attorneys can be accused of "manufacturing evidence." In this case, either Ms. Flanders or Mr. Davis

had to be wrong about what they saw on the fatal night. Both could not have been right, because their versions were "manifestly inconsistent." *Genzler*, 410 F.3d at 635. A well-prepared prosecutor would naturally want to explore such inconsistencies before calling such eyewitnesses to testify in court. Here, Ms. Flanders admitted to the prosecutor that she did not actually see most of the fight, and Mr. Davis admitted he was wrong about some preliminary details. If that qualifies as "manufacturing evidence," then any attempt by a prosecutor to reconcile or harmonize inconsistent eyewitness statements can be tagged with that label.

Even if Mr. Genzler had been acquitted – even if he retained the presumption of innocence – the challenged Opinion should have upheld prosecutorial immunity. The focus should be on whether the prosecutor's challenged actions were for the purpose of preparing for court, or to initiate a court case. Instead, the challenged Opinion focused on such things as whether some meetings took place before the preliminary hearing. *Genzler*, 410 F.3d at 642.

Why should a preliminary hearing affect prosecutorial immunity? Mr. Genzler's affirmed conviction should have mooted any issue of insufficient probable cause to prosecute him. The fact that a preliminary hearing was scheduled should have reinforced the prosecutor's claim that he acted as a prosecutor, not as a policeman. Why should preparing witnesses to testify in court be deemed a police function?

C. The Challenged Opinion Disregards Federal-State Comity.

The State Opinion correctly noted that Mr. Genzler's ultimate manslaughter conviction was a lesser-included offense of the original murder charge. App. 49. It correctly summarized Mr. Davis' testimony supporting the assault portion of the conviction, as follows:

> After the stabbing, Genzler approached Davis, slashed his knife within eight to ten inches of Davis's face and said, "Come on, mother-fucker. You want some of this, too? Come on, mother-fucker." Davis was scared; he did not want to be cut. The knife came so close that Davis believed if he had not moved back, he would have been cut by the knife. Davis backed up toward his van. Genzler followed Davis, continuing to scream, and to slash and jab the knife. When Davis reached the back of Genzler's car, he turned and ran to his van, got in the driver's seat and locked the doors. Genzler jumped on the bumper of the van and beat on the van's windshield with the butt end of his knife while screaming, "Get out, mother-fucker. Get out. I'll kill you, too, mother-fucker. You want some of this?" (Footnote omitted.) Davis put the van in reverse whereupon Genzler slipped off the bumper because it was wet; Davis backed up, drove around Genzler and went to a 7-Eleven where he had the clerk dial 911.
>
> . . . .
>
> The jury here was entitled to disbelieve all or part of Davis's account of the stabbing but to accept as true Davis's testimony about the assault, particularly since Davis's testimony about Genzler's post-stabbing conduct was corroborated, at

> least in part, by three other witnesses. Moreover, we find Genzler's argument unpersuasive because the rules of appellate review require that we accept as true the evidence favorable to the judgment. (Citations omitted.) Davis's testimony is favorable to the judgment and therefore we must accept it as true. Davis's testimony provided ample evidence to support an assault conviction.

App. 52-53, 58.

The State Opinion followed standard appellate practice by construing disputed facts in the light most favorable to Mr. Genzler's conviction, accepting Mr. Davis' pertinent testimony as true. The challenged Opinion construed the same facts the opposite way, to support Mr. Genzler's theory that Mr. Davis lied, and Ms. Flanders was coached to lie so she would not contradict Mr. Davis. As a result, a final State adjudication was treated with less respect than judicially-rejected contentions by a self-interested party. That seems contrary to basic notions of comity.

In State court, Mr. Genzler did not argue that the prosecutor acted in a police function, yet he asserted the same basic facts in both courts, as shown by this quote from the State Opinion:

> For the sake of this argument, we assume that Longanbach also improperly encouraged Flanders to be evasive or to lie in the first trial about Harless's violent conduct, and improperly suggested to Flanders that she change her story.
>
> . . . .

> Here, a fair retrial was possible and, in fact, occurred. Prior to the retrial, the prosecution disclosed evidence of Harless's prior violent conduct. During the retrial Genzler was able to impeach Flanders, a key prosecution witness, by bringing out evidence that she had suppressed evidence of Harless's violent confrontations in the first trial and had changed her version of what occurred after talking to Longanbach and his investigator. Genzler was also able to present Flanders's original version as told to the police shortly after the incident; her interview had been videotaped and was played before the jury.

App. 64-65.

That part of the State Opinion (if not ignored) could not possibly be construed in a light favorable to Mr. Genzler's federal claim, because it shows that Mr. Genzler received the appropriate remedy for arguably unethical prosecutorial acts in State court.

The challenged Opinion burdens all prosecutors with loss of traditional immunity, but its worst effect will be felt by diligent prosecutors who do not merely accept what police tell them, but independently search for the truth. Those are the prosecutors whose efforts are likely to result in eyewitnesses testifying differently from their police statements. Ironically, those are the prosecutors who (as here) will be unable to win pretrial dismissal of derivative civil rights lawsuits on grounds of prosecutorial immunity. They will be forced to essentially retry criminal cases in civil court, at the risk of personal liability and punitive damages if a civil jury, applying a lesser burden of proof, sympathizes with the offender and reaches different conclusions than the criminal jury.

A truly innocent criminal defendant should hope that a prosecutor will talk to eyewitnesses who have given inconsistent statements to police, because the truth might set him free. Even a not-innocent defendant can benefit, if such meetings disclose exculpatory information.

Mr. Genzler's own federal complaint starts with the following allegation:

> There is an old maxim which states that: *"The Prosecution delights in acquittal as much as conviction."* This maxim is based on the principle that it is the ethical duty of a prosecutor to seek justice and not merely convict. The defendants in this case have made a mockery of this principle.

App. 74. (Mr. Genzler's first amended complaint is also reproduced in the Appendix.) This is indeed a case about prosecutorial ethics, just as Mr. Genzler originally alleged. Prosecutorial ethics and police misconduct are two different things. Mr. Genzler did not sue any police officers or police agencies; he only sued prosecutors and prosecutorial defendants. App. 75-78. Nor did he allege unlawful arrest or unauthorized imprisonment. App. 108-117. The challenged Opinion is really a result-oriented refusal to apply prosecutorial immunity to the very type of situation where it is most needed.

CONCLUSION

The challenged Opinion tries to force the square peg of prosecutorial ethics into the round hole of a police function, despite a civil complaint that only alleges prosecutorial shortcomings. The resulting Opinion makes it possible for any convicted offender to overcome prosecutorial

immunity simply by alleging that the prosecutor coached independent eyewitnesses to lie in court. When overcoming prosecutorial immunity is that simple, revenge-minded offenders can be expected to take advantage of it. It is generally a bad idea to let any litigant sue an opposing attorney over how the case against him was prepared for trial.

Here, a criminal conviction has led to this civil lawsuit by an offender whose alleged constitutional deprivations were already remedied in State court, yet the challenged Opinion will allow this suit to go to trial. Substantial prosecutorial time and energy will be diverted to relitigating facts in federal court that were thought to have been adjudicated beyond reasonable doubt in State court, with the prosecutor individually liable if a civil jury (applying a lesser burden of proof) sympathizes with the offender.

The reasonable way to deal with suborning eyewitness perjury (or other suspected lapses of prosecutorial ethics) is precisely the way it was dealt with in Mr. Genzler's criminal case: by allowing Mr. Genzler's able criminal defense counsel to cross-examine eyewitnesses and confront them with prior inconsistent statements during his criminal trial. App. 65. If the criminal jury convicts, and if the State appellate court affirms, and if no other court sets it aside (all true here), that ought to be the end of it.

Justice will be better served if prosecutors devote their energies to prosecuting accused offenders, not defending themselves against convicted offenders. Federal courts should not ignore inconvenient parts of final State adjudications to allow convicted offenders to relitigate adjudicated facts, or to help them avoid prosecutorial

immunity. The Court should grant the petition, and restore basic principles of prosecutorial immunity.

Respectfully submitted,

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DATED: September 2, 2005

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

DAVID GENZLER, *Plaintiff-Appellee*, v. PETER J. LONGANBACH, *Defendant-Appellant*, and JEFFREY O'BRIEN; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE; GREGORY THOMPSON; JAMES PIPPEN; PAUL PFINGST, *Defendants*.	No. 02-56572 D.C. No. CV-01-01462-JNK
DAVID GENZLER, *Plaintiff-Appellee*, v. PETER J. LONGANBACH; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, *Defendants*, and JEFFREY O'BRIEN; GREGORY THOMPSON; JAMES PIPPEN; PAUL PFINGST, *Defendants-Appellants*.	No. 02-56573 D.C. No. CV-01-01462-JNK ORDER WITHDRAWING OPINION AND DENYING PETITION FOR REHEARING AND OPINION

App. 2

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted
December 2, 2003 – Pasadena, California

Filed June 7, 2005

Before: Harry Pregerson, Robert E. Cowen,*
and William A. Fletcher, Circuit Judges.

Opinion by Judge W. Fletcher

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Patrick L. Hosey, Hosey & Bahrambeygui, San Diego, California, for the appellee.

ORDER

The opinion filed on September 27, 2004, and published at *Genzler v. Longanbach,* 384 F.3d 1092 (9th Cir. Sep 27, 2004), is withdrawn and replaced by the attached opinion.

With the filing of this new opinion, the panel has voted unanimously to deny the petitions for rehearing.

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Judges Pregerson and Fletcher have voted to deny the petitions for rehearing en banc, and Judge Cowen so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and the petitions for rehearing en banc, filed by Appellants Longanbach and O'Brien, are **DENIED**.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiff David Genzler seeks damages under 42 U.S.C. § 1983 for violations of his constitutional rights during the investigation and prosecution of his state criminal homicide trial. Defendants San Diego County Deputy District Attorney Peter Longanbach and Investigator Jeffrey O'Brien appeal from the partial denial of their motions for summary judgment based on absolute official immunity. Defendant supervisors in the San Diego County District Attorney's Office – District Attorney Paul Pfingst, Assistant District Attorney Gregory Thompson, and Deputy District Attorney James Pippen – appeal the district court's complete denial of their motion for summary judgment based on absolute and qualified immunity.

We affirm the district court's partial denial of Longanbach's and O'Brien's motions. Evaluating the timing and nature of their conduct, we conclude that there is a genuine issue of material fact about whether they were engaged in advocacy intimately associated with the judicial

process when they interviewed a key witness, Sky Blue Flanders. However, we reverse the district court's denial of the supervisors' motion for summary judgment because we conclude that there is no genuine dispute that their involvement in prosecutorial decisions was advocacy intimately associated with the judicial process.

I. Factual Background

The underlying homicide giving rise to this § 1983 suit occurred on April 18, 1996, when David Genzler stabbed Dustin Harless during a fight. On April 19, Genzler learned from a television news report that Harless had died from the stabbing. Genzler turned himself into the police and was arrested that day. After the arrest, Deputy District Attorney Longanbach and Investigator O'Brien were assigned to the case.

A criminal complaint was filed in Municipal Court on April 23, 1996, and Genzler's bail hearing was held on April 29. On May 23, a preliminary hearing was held in Municipal Court, and the judge found probable cause to bind the case over for trial. The criminal complaint was filed in Superior Court on May 24.

The prosecution filed a pre-trial motion to compel production of evidence from the defense. At the hearing on this motion, Genzler's ex-girlfriend, Sherry Logel, testified under a grant of immunity that she had given a box of bloody clothing and a knife to Gerald Blank, Genzler's retained counsel. Blank said he had received the clothing and given it to the prosecution, but he denied receiving the knife. Longanbach then moved to recuse Blank as Genzler's counsel. At the hearing on this recusal motion, Logel testified that she had lied about delivering the knife to

Blank. The trial judge granted the recusal motion after Longanbach said he planned to call both Logel and Blank as witnesses at Genzler's trial. In a letter she later wrote to Genzler, Logel claimed that Longanbach had pressured her to testify falsely about her communication with Blank.

After trial, a jury convicted Genzler of second degree murder of Harless. This conviction, however, was reversed by the California Court of Appeal on the ground that the trial judge had improperly recused Blank. The Court of Appeal also held that Genzler was entitled to a jury instruction on involuntary manslaughter because there was sufficient evidence to support a finding of imperfect self-defense. Genzler had also alleged prosecutorial misconduct in his first trial, but the Court of Appeal did not reach this issue. The San Diego District Attorney's office recused itself from Genzler's second trial, and Genzler was prosecuted by the State Attorney General's office. On retrial, a second jury found Genzler guilty of involuntary manslaughter.

Sky Blue Flanders, Harless's fiancée, was a key witness for the prosecution in both trials. On the day of the stabbing, Flanders had told the police that Genzler had approached her in his car while she was walking across the street and had asked her if she wanted a ride. According to Flanders, Harless was zipping up his jacket on the other side of the street when Genzler first spoke to her. She told police that Harless had then crossed the street and knocked on Genzler's window. As Flanders described the events to police that day, Genzler got out of the car, Harless and Genzler exchanged punches, Harless "flipp[ed]" Genzler to the ground, and Genzler stabbed Harless while Harless held Genzler on the ground. Flanders also told police that day that Harless was a skilled

wrestler who had been involved in previous street fights. Police audio- and video-taped the interview with Flanders. Flanders testified in a later hearing that she had repeated this version of events -- in which Harless was on top of Genzler when Genzler stabbed him – to about 20 other people in the days following Harless's death.

Sometime after Flanders spoke with police on the day of the homicide, she met with Deputy District Attorney Longanbach and Investigator O'Brien. She met once separately with O'Brien sometime during the week before April 29, and once with Longanbach and O'Brien together on April 29. After these meetings, Flanders changed her story. She testified at the preliminary hearing on May 23 and at both trials that she remembered little of the actual fight because she was distracted by the arrival of Scott Davis, the doorman at the bar Flanders and Harless had left just before the stabbing. Flanders further testified that she thought she remembered seeing Davis pulling Genzler off Harless after the stabbing.

In her testimony during Genzler's second trial, Flanders admitted that she had "answer[ed] evasively" in the first trial about whether Harless had ever been involved in past fights and explained that she had tried to answer questions to make it seem that she was only aware of Harless's participation in organized wrestling matches, not of his past history of street-fighting. She also testified in the second trial that she had felt pressure from Longanbach and O'Brien not to disclose Harless's history of street-fighting.

Davis, the doorman, testified at the preliminary hearing and at both trials. In his interview with police the day after the homicide, Davis stated that he saw Genzler

jump out of his car and chase Harless and Flanders as they walked away from him, hand-in-hand. This account was manifestly inconsistent with the account Flanders had given police on the day of the homicide. Davis then met with O'Brien on April 25, and changed his story. In a report summarizing this April 25 meeting, O'Brien wrote that, "upon reflection," Davis considered that he had not seen the couple walking away from him hand-in-hand. At the May 23 preliminary hearing, Davis testified that Flanders and Harless were standing several feet apart when the fight began.

According to Genzler's version of events, the fight on April 18 began when Harless charged Genzler and punched him in the face. Genzler said that Harless had grabbed him, slammed his face to the ground and pinned his arm, and that Davis then began kicking him in the head. Genzler said that he stabbed Harless to defend himself from the attack.

After the second trial, Genzler was sentenced to six years for involuntary manslaughter. With credit for time already served, he was released on February 14, 2001.

II. The Present Action

After his release from prison, Genzler brought the present § 1983 action charging the defendants with prosecutorial misconduct both preceding and during his first trial.[1] The defendants moved unsuccessfully to dismiss Genzler's complaint under Federal Rule of Civil Procedure 12(b)(6).

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[1] Because Genzler does not allege conduct that would necessarily imply the invalidity of his conviction after the second trial, this suit is not barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

They then moved for summary judgment based on official immunity. The district court granted Longanbach and O'Brien's motions for summary judgment except for claims based on an allegation contained in paragraph 66 of Genzler's complaint. This paragraph alleges:

> [Longanbach and O'Brien] suborned perjury. Specifically, prior to the preliminary hearing and during the initial investigation of the incident, Longanbach and O'Brien met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past.

The district court read paragraph 66 to state that Longanbach and O'Brien were engaged in an investigative activity when they convinced Flanders to change her version of the events she witnessed. Relying on our opinion in *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001), the district court considered not only the nature of the defendants' acts but also their timing, and held that Genzler had produced sufficient evidence to create a genuine issue of material fact as to whether Longanbach and O'Brien had pressured Flanders to lie as part of their initial investigation. The district court accordingly denied this part of their motion.

The supervisory defendants also moved for summary judgment based on absolute and qualified immunity. The district court construed their motion to apply only to allegations contained in three paragraphs of the complaint: paragraphs 74, 81, and 82.[2] These paragraphs

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[2] The specific allegations are:

> 74. LONGANBACH and O'BRIEN's misconduct did not stop there. On August 22, 1996, at an evidentiary hearing held

(Continued on following page)

charged that Pfingst, Thompson, and Pippen knew that Longanbach had granted Logel immunity in exchange for her perjured testimony, and that they had condoned Longanbach's tactics to force recusal of Genzler's counsel. The district court denied the supervisory defendants' motion in its entirety.

Longanbach, O'Brien, and the supervisory defendants timely appealed. Whether official immunity applies is a question of law we review de novo. *Milstein,* 257 F.3d at 1007. We have jurisdiction over interlocutory denials of motions for summary judgment based on official immunity "to the extent that [the district court's decision] turns on a question of law." *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985); *see also Wilkins v. City of Oakland,* 350 F.3d 949,

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before the Honorable Joan P. Weber, LONGANBACH granted prosecution witness, Sherry Logel, immunity in exchange for testimony favorable to the prosecution. This grant of immunity included immunity from perjury and *not just from past acts of perjury, but was intended to cover future acts of lying on the stand at the trial of plaintiff.* In essence, LONGANBACH gave Ms. Logel a "get out of jail free card" for lying on the stand. This was done with the knowledge of PFINGST, THOMPSON and PIPPEN.

81. Neither Mr. Blank nor Ms. Logel were called as trial witnesses by LONGANBACH. It [sic] The entire presentation of false evidence and perjured testimony was nothing but an attempt to remove GENZLER's attorney from the case so as to improperly influence the outcome of the case which LONGANBACH had promised PFINGST, THOMPSON, and PIPPEN he would win.

82. LONGANBACH was excited by the recusal ploy he used. It became one of his favorite tactics. He tried the same tactic in other cases and on other attorneys. PFINGST, THOMPSON and PIPPEN were aware of what he was doing and how he was doing it, but continued to condone and ratify his conduct, because it worked.

951 (9th Cir. 2003) (quoting *Mitchell*). We construe all facts in the light most favorable to Genzler, the non-moving party, in deciding whether a dispute of fact is material and thereby precludes summary judgment. *See Butler v. San Diego County Dist. Attorney's Office,* 370 F.3d 956, 963 (9th Cir. 2004).

III. Discussion

A prosecutor is protected by absolute immunity from liability for damages under § 1983 "when performing the traditional functions of an advocate." *Kalina v. Fletcher,* 522 U.S. 118, 131 (1997). However, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993). Prosecutorial immunity depends on "the nature of the function performed, not the identity of the actor who performed it." *Kalina,* 522 U.S. 118 at 127 (quoting *Forrester v. White,* 484 U.S. 219, 229 (1988)). Prosecutors are entitled to qualified immunity, rather than absolute immunity, when they perform administrative functions, or "investigative functions normally performed by a detective or police officer." *Id.* at 126. *See also Burns v. Reed,* 500 U.S. 478, 494-96 (1991). For convenience, we shall refer to the latter activities as "police type investigative work."

The Supreme Court has consistently "emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Id.* at 486. Further, "the presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87. Finally we note that the Supreme

Court has "been quite sparing in [its] recognition of absolute immunity, and ha[s] refused to extend it any further than its justification would warrant." *Id.* at 487 (citations and quotation marks omitted).

To qualify as advocacy, an act must be "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Kalina,* 522 U.S. at 125 (quoting *Imbler*); *Buckley,* 509 U.S. at 270 (same); *Burns,* 500 U.S. at 479 (same); *see also Milstein,* 257 F.3d at 1009 (prosecutorial immunity protects "the prosecutor's actions [that] are closely associated with the judicial process") (citing *Imbler*). Such activity is sometimes called "quasi-judicial" conduct. *E.g., Broam v. Bogan,* 320 F.3d 1023, 1029 (9th Cir. 2003) ("[I]n deciding whether to accord a prosecutor immunity from a civil suit for damages, a court must first determine whether a prosecutor has performed a quasi-judicial function. If the action was part of the judicial process, the prosecutor is entitled to the protection of absolute immunity whether or not he or she violated the civil plaintiff's constitutional rights.") (citation and internal quotation marks omitted). In *Imbler,* the Court observed that absolute "immunity . . . leave[s] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 424 U.S. at 432. However, the Court explained that absolute immunity for prosecutorial advocacy is justified because, "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest" in protecting the prosecutor's abilities to exercise independent judgment and to advocate vigorously without the threat of retaliation. *Id.* at 429; *see also Milstein,* 257 F.3d at 1007-08. Thus, a prosecutor enjoys absolute immunity from a suit alleging that he

maliciously initiated a prosecution, used perjured testimony at trial, or suppressed material evidence at trial. *Imbler,* 424 U.S. at 430. A prosecutor is also absolutely immune for direct participation in a probable cause hearing, *Burns,* 500 U.S. at 491, and for preparing and filing charging documents, *Kalina,* 522 U.S. at 130.

In *Buckley,* the Supreme Court explored the limits of prosecutorial absolute immunity. The Court denied absolute immunity to prosecutors who had fabricated evidence "during the early stage of the investigation" when "police officers and assistant prosecutors were performing essentially the same investigatory functions." 509 U.S. at 273. The *Buckley* Court also denied absolute immunity to prosecutors accused of holding a defamatory press conference – an activity which "had no functional tie to the judicial process." *Id.* at 277. In other cases, the Court has held that a prosecutor does not have absolute immunity for providing legal advice to police that probable cause exists to arrest a suspect, *Burns,* 500 U.S. at 491, or for personally attesting to the truth of evidence in support of charging documents, *Kalina,* 522 U.S. at 130.

The analysis of whether prosecutorial acts constitute advocacy or police-type investigative work is complicated by the fact that the Supreme Court has resisted any attempt to draw a bright-line between the two. In *Buchanan,* the court noted that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." 509 U.S. at 274. This might suggest that once probable cause is present, or once an arrest has been made, a prosecutor assumes an advocacy-related role and enjoys absolute immunity. However, in a note appended to the quoted passage, the Court rejected this approach, explaining that "a determination of

probable cause does not guarantee a prosecutor absolute immunity for liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5.

The Court has also rejected the idea that prosecutors are only entitled to qualified immunity when they are engaged in investigation. In *Buchanan,* the Court said that "evaluating evidence and interviewing witnesses" in preparation for trial is advocacy. *Id.* at 273. This is true, notwithstanding the fact that some of the activities a prosecutor takes in preparation for trial, like the interview of witnesses, may be investigatory in nature. The question is whether a prosecutor's investigation is of the type normally done by police, in which case prosecutors enjoy only qualified immunity, or whether an investigation is bound up with the judicial process, thus affording prosecutors the heightened protection of absolute immunity. With this framework in mind, we consider the specific allegations against the defendants.

A. Longanbach and O'Brien

1. Witness Interviews: The Functional Analysis

The claim against Longanbach and O'Brien that survived summary judgment is that "prior to the preliminary hearing and during the initial investigation of the incident . . . [they] met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past." Like the district court, we understand this claim to state that as part of the initial investigation

Longanbach and O'Brien coerced or encouraged Flanders to lie.

Witness interviews may serve either an investigative or an advocacy-related function, as may other methods of gathering or manufacturing evidence prior to trial. *See KRL v. Moore,* 384 F.3d 1105, 1110-16 (9th Cir. 2004) (holding that pre-trial evidence gathering intimately associated with the judicial process was protected by absolute immunity, while evidence gathering for a collateral investigation was not). Viewing the evidence in the light most favorable to Genzler, we must decide whether Longanbach and O'Brien were engaged in an advocacy-related function "intimately associated with the judicial phase of the criminal process" when they met with Flanders, or whether they were engaged in police-type investigative work. *Imbler,* 424 U.S. at 430; *see also Milstein,* 257 F.3d at 1009; *Broam,* 320 F.3d at 1029. If the former, they are absolutely immune. If the latter, they are entitled only to qualified immunity.

If not done in a quasi-judicial capacity, the acquisition or manufacturing of evidence is not protected by absolute immunity. *Milstein,* 257 F.3d at 1011 ("acquiring known false statements from a witness for use in a prosecution is . . . fabricating evidence that is unprotected by absolute immunity"). In *Moore v. Valder,* 65 F.3d 189, 194-95 (D.C. Cir. 1995), the D.C. Circuit held that a prosecutor had not met his burden to show that he was entitled to absolute immunity for acts of intimidating and coercing witnesses into changing their testimony before a grand jury. The court held that such activity constitutes

> a misuse of investigative techniques legitimately directed at exploring whether witness testimony

> is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution.

Id. at 194 (citing *Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir. 1987)).

Prosecutors are, however, absolutely immune "for gathering additional evidence after probable cause is established or criminal proceedings have begun *when they are performing a quasi-judicial function.*" *Broam*, 320 F.3d at 1030 (emphasis added). As the Court in *Buckley* explained,

> [t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a police officer, it is neither appropriate nor justifiable that, for the same act, [absolute] immunity should protect the one and not the other.

509 U.S. at 273. A prosecutor gathering evidence is more likely to be performing a quasi-judicial advocacy function when the prosecutor is "organiz[ing], evaluati[ng], and marshaling [that] evidence" in preparation for a pending trial, in contrast to the police-like activity of "*acquiring* evidence which might be used in a prosecution." *Barbera*, 836 F.2d at 100.

The timing of evidence gathering is a relevant fact in determining how closely connected that conduct is to the

official's core advocacy function in the judicial process, and thus informs the inquiry into whether the official's conduct is protected by absolute immunity. The Supreme Court has held that when a witness is being coached at or during a break in trial, the prosecutor is protected by absolute immunity even if he or she is instructing the witness to lie. *Imbler,* 424 U.S. at 430, 431 n.33; *cf. Herb Hallman Chevrolet, Inc. v. Nash Holmes,* 169 F.3d 636, 643 (9th Cir. 1999) (holding that prosecutors were absolutely immune for interviewing new witnesses during investigative grand jury proceedings, when the majority of other witnesses had been interviewed prior to the initiation of proceedings).

Longanbach and O'Brien rely on the timing of their meetings with Flanders to argue that they are entitled to absolute immunity. They point out that their meetings with Flanders occurred after Genzler's April 19 arrest, which Genzler concedes was based on probable cause. However, as we noted above, in *Buckley,* the Court was careful to state that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5. While interviews conducted before probable cause to arrest has been established are not protected by absolute immunity, the converse is not necessarily true. As the district court correctly observed, the courts have only "draw[n] the line in the reverse, stating that absolute immunity could not be invoked before probable cause was established." Indeed, in *Robichaud v. Ronan,* 351 F.2d 533, 535 (9th Cir. 1969), we held that prosecutors who, soon after the arrest of a

suspect, directed police to coerce a confession from that suspect were not entitled to absolute immunity because their activity was more police-like than prosecutorial.

Timing is thus a relevant, but not necessarily determinative, factor. *See KRL,* 384 F.3d at 1111 (citing *Cousin v. Small,* 325 F.3d 627, 636 (5th Cir. 2003)); *see also Kulwicki v. Dawson,* 969 F.2d 1454, 1466 (3rd Cir. 1992). We also focus on whether the character of the meetings was more in the nature of quasi-judicial advocacy or police-type investigative work.

Because Deputy District Attorney Longanbach and Investigator O'Brien were engaged in slightly different functions, we analyze separately their entitlements to absolute immunity. As all parties acknowledge, it is appropriate to focus on the functions performed by Longanbach and O'Brien, not on their titles.

2. O'Brien's Meeting with Flanders Before April 29

Viewing the facts in the light most favorable to Genzler, we conclude that O'Brien was engaged in police-type investigative work, not quasi-judicial advocacy, when he met with Flanders prior to Genzler's bail hearing on April 29, 1996. O'Brien's report indicates that he met with Flanders "several days prior" to April 29. In her testimony during the hearing on Genzler's 2000 motion to dismiss, Flanders estimated that this meeting took place about a week before the April 29 joint meeting with Longanbach and O'Brien. She remembered that she and O'Brien had talked for about an hour, "primarily . . . as to the identity of the person who stabbed [Harless]."

Police investigations were still ongoing. At this time, the preliminary hearing at which the judge would decide whether there was probable cause to hold Genzler for trial in superior court was still over a month away. Moreover, it is a supportable conclusion from the evidence that O'Brien's meeting with Flanders took place before the criminal complaint was filed in municipal court on April 23, 1996, and before police finished their investigation and written synthesis, which is dated April 24, 1996. *See Kulwicki,* 969 F.2d at 1465 (noting that filing of a criminal complaint is a relevant but not dispositive factor in determining whether an interview involves investigation or advocacy).

The written police synthesis leaves out the initial statement by Flanders to police that Harless was on top of Genzler at one point during the fight. It emphasizes Davis's point of view, but it does not include Davis's story that Flanders and Harless were walking hand-in-hand. If all factual inferences are resolved in favor of Genzler, one could conclude that O'Brien used this interview to change Flanders's story about what she remembered and to make her story more consistent with Davis's story.

Further, the record reflects that during this period, O'Brien was engaged in other work that can only be characterized as police-type investigation. For example, he and Longanbach interviewed Scott Davis on April 25, 1996. The notes from the conversation reflect only a narrative from Davis's point of view about the events of the stabbing. O'Brien joined police Detective Warrick in a meeting on June 3, 1996 with Sherry Logel, Genzler's ex-girlfriend, discussing her story about giving Genzler's knife to Blank, and Genzler's character in general. This conversation, too, was police-type investigative work, as

indicated by the nature of the information obtained and by the presence of Detective Warrick. On June 5, 1996, O'Brien interviewed Paul Ernst, another witness to the homicide, about what he had seen. Similarly, on June 28, 1996, O'Brien met again with John Belsan, who came forward with evidence about a past fight with Genzler. Again, O'Brien's notes from this conversation reflect only Belsan's narrative about what happened in that confrontation. That O'Brien was engaged in police-type investigative work during the time he met with Flanders supports an inference that he was also engaged in such work when he met with her.

We conclude from the foregoing that there is sufficient evidence in the record to support the conclusion that, during his first meeting with Flanders, O'Brien was, like the prosecutor in *Moore,* engaged in the process of acquiring or manufacturing evidence during performance of police-type investigative work, rather than engaged in quasi-judicial advocacy. At this stage of the proceedings, O'Brien is therefore unprotected by absolute immunity.

Absolute immunity does not protect Longanbach if he was directing this police-type investigative activity by O'Brien. *See Joseph v. Patterson,* 795 F.2d 549, 556 (6th Cir. 1986) ("a prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court") (citation and internal quotation omitted); *Robichaud,* 351 F.2d at 537 (holding that prosecutors are not absolutely immune if they either "committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity");

cf. Burns, 500 U.S. at 496 (prosecutor not entitled to absolute immunity for act of giving legal advice to police). Longanbach cannot, however, be liable for O'Brien's conduct on a theory of vicarious liability for any independent actions taken by O'Brien. *See Monell v. Dep't of Social Servs. of NY,* 436 U.S. 658, 691 (1978) (respondeat superior not available as theory of liability under § 1983).

There is sufficient evidence in the record to support the conclusion that Longanbach was actively directing O'Brien throughout his work on the Genzler case, including O'Brien's first meeting with Flanders. For example, Flanders testified that Longanbach would give her instructions that O'Brien would then "reiterate." Genzler also introduced a declaration from another Deputy District Attorney stating that "Jeff O'Brien does whatever Mr. Longanbach told him to do." Because the evidence could support a conclusion that Longanbach was actively directing police-type investigative actions by O'Brien, Longanbach is also not entitled to summary judgment that he is absolutely immune for any action taken with respect to O'Brien's meeting with Flanders before April 29.

3. Longanbach and O'Brien's April 29 Meeting with Flanders

The next question is whether Longanbach and O'Brien were engaged in police-type investigative work or quasi-judicial advocacy in their joint April 29 meeting with Flanders.

We consider first the timing of the conversation. The criminal complaint had been filed by the time of Longanbach and O'Brien's April 29 meeting with Flanders. However, just as the existence of probable cause to arrest

is not conclusive, we do not view the filing of the complaint as an event after which, by definition, all actions by the prosecutor and his staff are protected by absolute immunity. The timing of the April 29 meeting does not weigh as much in favor of absolute immunity as did the timing of the search carried out pursuant to a warrant in *KRL,* 384 F.3d at 1111-13. In *KRL,* we held that a prosecutor and his investigator were entitled to absolute immunity for seeking a search warrant and carrying out a search pursuant to that warrant more than three weeks after the grand jury returned an indictment indicating that it had found sufficient evidence for the defendant to stand trial. *Id.* When Longanbach and O'Brien met with Flanders, the preliminary hearing at which the court would determine whether there was probable cause for Genzler to stand trial was still more than three weeks away. On April 29, officials were continuing the process of investigation into the facts that would inform whether there was such probable cause, and the precise charges on which Genzler would stand trial had yet to be determined.

We next consider the nature of the interview with Flanders. The Supreme Court has stated that

> acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the court of his [or her] role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include *the professional evaluation of evidence assembled by the police and appropriate preparation for its presentation at trial* or before a grand jury after a decision to seek an indictment has been made.

Buckley, 509 U.S. at 273 (emphasis added); *see also Broam*, 320 F.3d at 1030. In *KRL*, we held that "to the extent that the second search warrant sought evidence to prosecute the crimes charged in the indictment," the prosecutors' authorization of that warrant and an investigator's subsequent search were protected by absolute immunity. 384 F.3d at 1112, 1118. We held that the prosecutors and the investigator were acting as advocates to the extent they were reviewing, evaluating, and ensuring the admissibility of evidence in preparation for an already pending trial. *Id.*

There is some evidence in the record that Longanbach and O'Brien were reviewing and evaluating evidence at the April 29 meeting in preparation for the preliminary hearing and trial testimony, including some testimony by Flanders describing the meeting at some of the later proceedings in Genzler's case. However, when we resolve all ambiguity in favor of Genzler and view the evidence in the context of other evidence about ongoing investigations, we conclude that evidence in the record supports the conclusion that Longanbach and O'Brien were engaged in police-type investigative work during the meeting.

The only notes in the record from the meeting were taken by O'Brien. They are captioned, "Witness Interview." These interview notes, like notes taken of other interviews by O'Brien, record only a narrative of what Flanders reportedly said at the meeting about the events of April 17 and April 18. The notes state that "FLANDERS had told me during a conversation that took place at her residence several days earlier that she had a clearer picture in her mind of the events surrounding HARLESS' death. She felt that she could relate them in a more organized fashion than she may have done earlier in the investigation."

Specifically, the notes state that Flanders was "distracted" by the arrival of Scott Davis, which is inconsistent with the initial statement Flanders made to police. The notes thus reflect that Longanbach and O'Brien were in the process of gathering information from Flanders during the meeting and possibly encouraged her to lie as part of their process.

The Fifth Circuit decision in *Cousin,* relied on heavily by Longanbach and O'Brien, is therefore inapposite. In *Cousin,* the Fifth Circuit held that a declaration by a witness who was allegedly coerced and intimidated into lying "eliminate[d]" any "ambiguity" about whether the prosecutor was engaged in an investigatory or quasi-judicial function when he interviewed that witness. 325 F.3d at 633. The declaration clearly showed that when the prosecutor met with the witness, "he did so to tell [the witness] how he should testify." *Id.* Here, by contrast, the interview notes show a process of police-type investigation – or, viewed in the light most favorable to Genzler, a process of manufacturing evidence while performing an police-type investigative work – not Longanbach or O'Brien acting as advocates by actively preparing Flanders for her testimony in court. *See Moore,* 65 F.3d at 194.

We therefore agree with the district court that Longanbach and O'Brien are not entitled to summary judgment that they are absolutely immune for their actions during the April 29 meeting with Flanders.

4. Summary

A prosecuting attorney may perform many roles, or functions. *See Robichaud,* 351 F.2d at 537 (citing Edward L. Barrett, Jr., *Police Practices and the Law – From Arrest*

to Charge, 50 Cal. L. Rev. 11, 16-24 (1962)). Not all of these roles are protected by absolute immunity. *See Robichaud*, 351 F.2d at 537 ("The distinction between the roles may be significantly controlling."). We recognize that the two meetings with Flanders described here were to some degree related to trial preparation, even when viewed in the light most favorable to Genzler. The Supreme Court has cautioned, however, that "[a]lmost any action by a prosecutor, including his or her participation in purely investigative activity, could be said to be in some way related to the ultimate decision to prosecute, but we have never indicated that absolute immunity was that expansive." *Burns*, 500 U.S. at 495-96. We therefore remain focused on the question whether the prosecutor's actions are *"intimately associated with the judicial phase of the criminal process." Id.* at 487 (emphasis added) (quoting *Imbler*, 424 U.S. at 430). We do not read the record here, resolving all ambiguity in favor of Genzler, to indicate such a close association between Longanbach and O'Brien's actions in their witness interviews with Flanders, on the one hand, and the judicial phase of Genzler's criminal trial, on the other, to entitle them to summary judgment that they are absolutely immune for those actions. We therefore affirm the district court's partial denial of summary judgment to Longanbach and O'Brien.

B. The Supervisory Defendants

The next issue is whether Pfingst, Thompson, and Pippen – the supervisory defendants – are entitled to absolute immunity. The district court understood the supervisory defendants to have moved for summary

judgment on only three allegations in Genzler's complaint, specifically paragraphs 74, 81, and 82.[3] The district court did not view the motion as including any other allegations against the supervisory defendants in Genzler's complaint, and its ruling did not extend to any such allegations. We construe the supervisory defendants' motion for summary judgment as did the district court.

We reverse the district court's denial of summary judgment with respect to the allegations contained in these three paragraphs. We apply the "function test" to determine whether the supervisory defendants are entitled to absolute immunity. *Roe v. City and County of San Francisco,* 109 F.3d 578, 584 (9th Cir. 1997). To decide whether absolute immunity applies, we assume without deciding that Genzler has alleged a deprivation of a constitutional right under § 1983. *See Buckley,* 509 U.S. at 261.

The relevant paragraphs state (1) that the supervisory defendants knew that Longanbach had granted Logel immunity in exchange for perjured testimony favorable to the prosecution; (2) that Longanbach had promised the supervisory defendants he would win Genzler's case; and (3) that the supervisory defendants were aware of and condoned a ploy to use Logel's perjured testimony to force the recusal of Genzler's counsel of choice. Each of these statements describes conduct closely related to prosecutorial decisions in the trial phase of Genzler's case. These actions all involve advocacy "intimately associated with the judicial phase of the criminal process," *Imbler,* 424 U.S. at 430, for which the supervisory defendants are

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[3] *See supra* pages 6473-74, n.2.

entitled to absolute immunity. *See id.* at 431 (presenting perjured testimony protected by absolute immunity); *Mullinax v. McElhenney,* 817 F.2d 711 (11th Cir. 1987) (offering a witness immunity in exchange for testimony protected by absolute immunity); *see also Rivera v. Green,* 775 F.2d 1381, 1384 (9th Cir. 1985) (holding that a prosecuting attorney and his supervisor had absolute immunity "for their actions in prosecuting a case against" a defendant).

Conclusion

We affirm the district court's partial denial of summary judgment as to Longanbach and O'Brien. We reverse the district court's denial of summary judgment as to Pfingst, Thompson, and Pippen. We express no opinion about whether Genzler has stated a violation of a constitutional right that is actionable under 42 U.S.C. § 1983, or whether the defendants may be entitled to qualified immunity. We leave these determinations to the district court in the first instance.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID GENZLER, Plaintiff, vs. PETER LONGANBACH, an individual; JEFFREY O'BRIEN, an individual; GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 01CV1462 K JAH ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT LONGANBACH'S MOTION FOR SUMMARY JUDGMENT [44] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS PFINGST'S, THOMPSON'S, O'BRIEN'S, AND PIPPEN'S JOINT MOTION FOR EARLY SUMMARY JUDGMENT [47] (Filed Aug. 13, 2002)

The Court considers two motions for summary judgment filed on June 11, 2002, by (i) Deputy District Attorney Peter Longanbach, and (ii) San Diego County District Attorney Paul Pfingst, Deputy District Attorney Gregory Thompson, Deputy District Attorney James Pippen, and Jeffrey O'Brien, an investigator employed by the DA's Office (together, the "Individual Defendants"). Plaintiff opposes both motions. All parties proceed through counsel.

This case arises from an altercation in 1996 between Plaintiff and Dusty Harless, which resulted in Dusty Harless' death. Plaintiff alleges that prosecutorial misconduct lead to his state court conviction for second degree

murder on February 10, 1997. Following reversal and retrial, Plaintiff was convicted of involuntary manslaughter on August 25, 2000. Plaintiff sues each Defendant in his individual and official capacity for (i) violations of civil rights under 42 U.S.C. § 1983 and (ii) conspiracy to violate civil rights under 42 U.S.C. § 1983.

I. Applicable Legal Standards

Because Defendants' two separate motions each rely on the same legal standards for summary judgment and absolute prosecutorial immunity, the Court provides those standards at the outset.

A. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if a dispute over it "might affect the outcome of the suit under governing law. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment will not be granted if the dispute is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant has the initial burden of demonstrating that summary judgment is proper. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The burden then shifts to the nonmovant to show that summary judgment

is not appropriate. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). To make such a showing, the nonmovant must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *See id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

B. Absolute Prosecutorial Immunity

In *Milstein v. Cooley,* 257 F.3d 1004 (9th Cir. 2001), the Ninth Circuit surveyed the law governing absolute prosecutorial immunity. The Court quotes heavily from the *Milstein* decision as it provides the controlling Ninth Circuit framework for analyzing Defendants' motions insofar as they are based upon absolute prosecutorial immunity.

According to the Ninth Circuit:

> The text of 42 U.S.C. § 1983, which establishes a federal cause of action for the violation of federal rights by state officials, contains no exceptions. However, the Supreme Court has attributed to the Congress that passed § 1983 knowledge of then-existing common-law immunities, and the lack of an explicit abrogation of these immunities has been interpreted as preserving them.
>
> The immunity of a prosecutor is based upon the same purpose that underlies the immunity of judges and grand jurors acting within the scope of their duties: to protect the judicial process. Specifically, absolute immunity for prosecutors is warranted (1) to allow prosecutors to focus their

> energies on prosecuting, rather than defending lawsuits; (2) to enable prosecutors to exercise independent judgment in deciding which suits to bring and conducting them in court; (3) to preserve the criminal justice system's function of determining guilt or innocence by ensuring that triers of fact are not denied relevant (although sometimes conflicting) evidence because of prosecutors' fear of suit; and (4) to ensure fairness to defendants by enabling judges to make rulings in their favor without the subconscious knowledge that such rulings could subject the prosecutor to liability. . . .
>
> The seminal case on absolute immunity for prosecutors is *Imbler v. Pachtman,* where the Supreme Court held that "in initiating a prosecution and in presenting the State's case," the prosecutor is immune from a civil suit for damages under § 1983. This immunity covers the knowing use of false testimony at trial, the suppression of exculpatory evidence, and malicious prosecution. The Court reasoned that these activities are "intimately associated with the judicial phase of the criminal process." The Court acknowledged that at some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator or investigator rather than as an officer of the court. . . .
>
> Additionally, the Court announced a line before which absolute immunity could not apply: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."

Milstein, 257 F.3d at 1007-1010 (internal citations omitted).

II. Discussion of Defendant Longanbach's Motion for Summary Judgment

A. Absolute Prosecutorial Immunity

The allegations against Defendant Longanbach upon which he moves for summary judgment fall into the following four categories: (i) hiding and/or withholding evidence (Complaint at ¶¶ 16, 58, 62, 71, 86); (ii) presenting false testimony to the jury (Complaint at ¶¶ 70, 74, 75, 80, 81, 87, 89); (iii) tampering with recorded witness statements and investigative reports (Complaint at ¶¶ 56, 62, 68, 88); and (iv) tampering with and threatening witnesses and suborning perjury (Complaint at ¶¶ 59, 66, 69, 75, 78, 94). Motion at 5-6.

Defendant Longanbach categorically denies each of these allegation. Assuming the allegations are true, however, he initially presents the summary argument that he is absolutely immune from each of them because they each occurred after Plaintiff had been arrested, and thus probable cause had already been established. Therefore, he argues, the initial investigation into the killing was complete and he was acting as an advocate for the state for which immunity attaches, and not as an investigator or detective for which only qualified immunity attaches. Motion at 6. At the outset, the Court rejects this summary argument. It is true, as quoted above, that the Ninth Circuit rule is that "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Milstein*, 257 F.3d at 1010 (*citing Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993)). However, this holding is not that any activity undertaken by a prosecutor after an arrest based upon probable cause is advocatory and thus protected by absolute immunity. To the contrary, the Ninth Circuit was drawing the line in the

reverse, stating that absolute immunity could not be invoked before probable cause was established. *Id.* The possibility thus exists that some actions undertaken by a prosecutor after the establishment of probable cause could be unprotected by absolute immunity.

This conclusion is consistent with the Supreme Court dicta from *Buckley*:

> Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity . . . for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in "police investigative work" that is entitled to only qualified immunity. . . ."

Buckley, 509 U.S. at 2616, n.5. The Court therefore rejects Defendant Longanbach's initial summary argument and discusses each category of allegation against Defendant Longanbach in turn.

1. Hiding and/or Withholding Evidence

Defendant Longanbach argues that the following allegations, if proven, would clearly be prosecutorial, not investigatory, in nature, and thus subject to absolute immunity: (i) hiding evidence, Complaint at ¶ 16; (ii) planning to keep exculpatory information, evidence and documents, to which Genzler's attorneys were entitled, from Genzler's attorneys, Complaint at ¶ 58; (iii) hiding or withholding large amounts of potentially exculpatory evidence until the eve of or after the preliminary hearing, Complaint ¶ 62, 71; and (iv) hiding a police incident report relating to an alleged 1993 incident between Plaintiff and a prosecution witness in Plaintiff's first trial which Plaintiff claims would have aided in his defense, Complaint at ¶ 86.

Defendant Longanbach argues that in *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976), the Supreme Court held that allegations regarding the suppression of exculpatory evidence are subject to absolutely immune as such suppression is "intimately associated with the judicial phase of the criminal process." He similarly argues that the suppression of exculpatory evidence is covered by absolute immunity under *Milstein,* 257 F.3d at 1008. Upon review of these controlling cases, the Court agrees, and holds that even if proven, Defendant Longanbach is absolutely immune from Plaintiff's allegations that he "hid and/or withheld" evidence, because these allegations are substantively equivalent to the "suppression" of evidence claims held by the Supreme Court to be subject to absolute prosecutorial immunity. In *Imbler,* the suppressed evidence consisted of exculpatory fingerprint evidence and an exculpatory lie detector test. *Imbler,* 424 U.S. at 416. Such exculpatory evidence is similar to the exculpatory evidence Plaintiff currently claims was unlawfully hidden or withheld. Moreover, the Ninth Circuit has recently reiterated this aspect of the *Imbler* holding, stating that under *Imbler,* absolute prosecutorial immunity covers "the suppression of exculpatory evidence." *Milstein,* 257 F.3d at 1008. Defendant Longanbach's motion for summary judgment as to Plaintiff's claims regarding the hiding and/or withholding of evidence contained in the Complaint at ¶¶ 16, 58, 62, 71, 86 is therefore **GRANTED**.

2. Presenting False Testimony to the Jury

Defendant Longanbach argues that Plaintiff's claims that he presented false testimony to the jury, if proven, is covered by absolute immunity under *Imbler,* 424 U.S. at 416, 431. The specific allegations at issue are that Defendant

Longanbach: (i) knew that certain witness testimony as to past aggressive conduct by Dusty Harless would be inculpatory and therefore pressured the witness to provide such testimony even though he knew it was dishonest, Complaint at ¶ 70; (ii) granted a prosecution witness immunity in exchange for testimony he knew was perjured and favorable to the prosecution, which immunity shielded the witness from prosecution for perjury and for future acts of lying on the stand at Plaintiff's trial, Complaint ¶ 74, 75, 80, 81; and (iii) suborned perjured testimony regarding a prior violent act committed by Plaintiff, Complaint at ¶ 87, 89.

Defendant Longanbach's argument is correct in that the Supreme Court held in *Imbler,* 424 U.S. at 416, that when a witness gives false testimony, absolute immunity attaches to a prosecutor's intentionally and negligently allowing it. Moreover, the Ninth Circuit has recently reiterated this aspect of the *Imbler* holding, stating that under *Imbler,* absolute prosecutorial immunity covers "the knowing use of false testimony at trial." *Milstein,* 257 F.3d at 1008. Defendant Longanbach's motion for summary judgment as to Plaintiff's claims regarding the presentation of false testimony to the jury contained in the Complaint at ¶¶ 70, 74, 75, 80, 81, 87, 89 therefore **GRANTED**.

3. Tampering with Recorded Witness Statements and Investigative Reports

Defendant Longanbach argues that Plaintiff's allegations that he tampered with recorded witness statements and investigative reports, if proven, are subject to absolute immunity because he carried out these activities in an advocatory rather than an investigatory role. Specifically,

the allegations in question are that Defendant Longanbach: (i) had the District Attorney's investigative report destroyed and redrafted deleting any reference to Dusty Harless' prior physical conflicts or any other potentially exculpatory evidence/information, Complaint at ¶ 56; (ii) had tapes of witness testimony tampered with, Complaint at ¶ 62; and (iii) used his position to remove the only available copies of a certain crime/incident report from the San Diego Police Department which prejudiced Plaintiff, Complaint at ¶ 88. Defendant Longanbach also includes Complaint ¶ 68 in this category, but that paragraph does not allege tampering with recorded statements or investigative reports and is, therefore not considered.

Defendant Longanbach relies on *Imbler* in making this argument. In *Imbler,* the plaintiff had accused the prosecutor/defendant of using "at trial a police artist's sketch of [the killer] made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused on him." *Imbler,* 424 U.S. at 416. The Supreme Court found the prosecutor/defendant absolutely immune from this allegation as the alleged action was "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Plaintiff argues in opposition that *Imbler* is factually distinguishable because in "that case the defendant prosecutor did not himself nor did he instruct anyone to manipulate the police artist's sketch. He had no part in the alleged tampering of evidence. Rather, he was accused of using the altered sketch in the trial." Opposition at 14. The Court agrees with Plaintiff's argument that the *Imbler* facts were prosecutorial because they related to the prosecutor's actual use of the sketch at trial; those facts do not suggest that a prosecutor who himself tampers with recorded witness

statements and investigative reports, or orders such tampering, is entitled to absolute immunity for those actions. In the absence of a showing of any other law suggesting absolute prosecutorial immunity for these alleged acts, the Court **DENIES** Defendant Longanbach's motion for summary judgment as to the allegations relating to tampering with recorded witness statements and investigative reports contained in the Complaint at ¶¶ 56, 63, 68 (see note above), and 88, based upon absolute immunity.

4. Tampering with Witnesses and Suborning Perjury

Defendant Longanbach argues that Plaintiff's allegations relating to witness tampering and suborning perjury are subject to absolute prosecutorial immunity. These allegations differ from those in category (ii), "presenting false testimony to the jury." Unlike the knowing presentation of false testimony, these allegations involve the actual suborning of false testimony.

These allegations are also analytically distinguishable from those in category (iii), "tampering with recorded witness statements and investigative reports," even though both categories seemingly deal with the fabrication of evidence. The category (iii) allegations dealt with tampering and alteration of physical evidence, a subject about which no case law has been presented. The category (iv) allegations, with the exception of one, deal with acquiring known false statements from witnesses after probable cause has been established, which has been discussed by the Supreme Court and the Ninth Circuit, as discussed below.

The allegations Defendant Longanbach places at issue are as follows: (i) that while investigating the case, he coerced and bullied witnesses into changing their testimony related to what occurred on the night of the incident, Complaint at ¶ 59; (ii) that he suborned perjury by meeting with a witness prior to the preliminary hearing and during the initial investigation of the incident, telling her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past, Complaint at ¶ 66; (iii) that the same witness was told to testify falsely about having actually seen Mr. Harless in prior street or bar fights and about her knowledge thereof, Complaint at ¶ 69; (iv) that he specifically directed another witness to perjure herself regarding the murder weapon, Complaint at ¶ 75; (v) that the same witness lied because she was threatened by Defendant Longanbach that if she didn't falsely testify, Defendant Longanbach would send her to jail and take away her children, Complaint at ¶ 78; and (vi) that Defendant Longanbach, in an effort to explain the degradation of DNA evidence in blood stains on Plaintiff's shirt, wanted to argue that Plaintiff himself washed the shirt to cover up the crime, and therefore suggested that the investigating police officer leave rain out of the written description of the weather conditions on the evening of the incident, Complaint at ¶ 94.

In opposition, Plaintiff argues that in *Milstein*, 257 F.3d at 1011, the Ninth Circuit held that a prosecutor would not be entitled to absolute immunity if it can be demonstrated that he knowingly obtained false statements for the purpose of prosecution. In so holding, the Ninth Circuit stated that absolute immunity does not attach to allegations that prosecutors knowingly *obtained* false

statements for the purpose of prosection. *Id.* The Ninth Circuit analogized from the Supreme Court's holding in *Buckley,* reasoning that just as the Supreme Court held that shopping for a dubious expert opinion is fabricating evidence unprotected by absolute immunity, so is acquiring known false statements from a witness for use in a prosecution. *Id.* Plaintiff asks this Court to similarly analogize that the acts he alleges of suborning perjury are akin to fabricating evidence, unprotected by absolute immunity.

The Court recognizes the similarities of the allegations. However, the Court cannot ignore that the subject activities in both *Milstein* and *Buckley* occurred well before the empaneling of a grand jury, and thus well before probable cause had been established, and that both the *Milstein* and *Buckley* courts relied heavily on such circumstance in characterizing the actions as investigatory and in denying absolute immunity for those claims. *Milstein,* 257 F.3d at 1011 and *Buckley,* 509 U.S. at 275-76 (prosecutor's fabrication of evidence occurred during the preliminary investigation of an unsolved crime). Here, only allegation (ii), Complaint ¶ 66, specifically avers that the suborning of perjury occurred "prior to the preliminary hearing." Thus, the acts alleged in ¶ 66 occurred prior to the establishment of probable cause and are not subject to absolute immunity.

Each of the other allegations in this category appears to relate to actions which occurred once the investigative detective work was done, probable cause was established, and Defendant Longanbach was preparing for trial. The Court therefore holds that absolute immunity attaches to those allegations in this category which occurred once probable cause had been established and **GRANTS**

Defendant Longanbach's motion for summary judgment as to the allegations regarding suborned perjury contained in the Complaint at ¶¶ 59, 69, 75, 78, 94. However, the Court **DENIES** summary judgment on absolute immunity grounds as to the allegations contained in the Complaint at ¶ 66.

B. Genuine Issue as to Any Material Fact

Defendant Longanbach alternatively argues that regardless of whether he is entitled to absolute immunity, Plaintiff is in any case unable to provide any evidence to support his claims of wrongdoing and summary judgment must therefore be granted in his favor. Motion at 10. Because the Court grants Defendant Longanbach's motion as to Plaintiff's allegations under categories one, two and four, above, with the exception of the allegations contained in the Complaint at ¶ 66, the Court discusses summary judgment only as to the allegations under category three and Complaint ¶ 66.

For purposes of summary judgment, Defendant Longanbach may meet his burden of showing the absence of a genuine issue of material fact by showing to the district court that there is an absence of evidence to support the nonmovant's case. *Fairbanks v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "Once the moving party has met its initial burden; Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* (internal citations omitted). To this end, Defendant Longanbach simply argues that Plaintiff has no evidence, and

that no evidence exists, to support the following three allegations:

1. Complaint ¶ 56

This paragraph and those around it allege that Longanbach ordered O'Brien to destroy his initial investigatory report and redraft it deleting any reference to Mr. Harless' prior physical conflicts or any other potentially exculpatory evidence or information. In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff argues that "Longanbach ordered O'Brien to destroy the report and redraft it deleting any reference to prior physical conflicts or any other potentially exculpatory evidence/information. . . . O'Brien did as he was told, later stating that he works for Longanbach and 'my job is to do what he tells him to do.'" Opposition at 5. In support of these factual assertions, Plaintiff relies upon his statement of disputed material fact ("DMF"), ¶¶ 20-21.

Those paragraphs refer to case notes prepared by another District Attorney Office employee, Rebecca Blair-Hartunian, which state that when she expressed surprise to O'Brien upon hearing him speak about the subject exculpatory evidence/information, "O'Brien replied that [Longanbach] had told him not to put it into the report." Exhibit 12 at 100118. Although this information appears to raise a genuine issue of triable fact as to the subject report, and might normally be admissible into evidence as an admission against penal interest, Defendant Longanbach objects on evidentiary ground to the Blair-Hartunian notes pursuant to Fed.R.Evid. 801 & 802 (Hearsay), 805 (Hearsay within Hearsay), and 901 (Authentication). The

Court agrees with the objection based upon Rule 901 because Plaintiff provides no authentication whatsoever of the purported case notes. The Court therefore **GRANTS** Defendant Longanbach's evidentiary objections to this exhibit and **GRANTS** his motion for summary judgment as to Plaintiff's claims regarding the subject report.

2. Complaint ¶ 63

This paragraph and those around it allege that a tape of witness testimony had been tampered with by Defendants Longanbach and O'Brien. In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff argues that "Longanbach and O'Brien received the tape shortly after it was created – and now the first half of it was missing." Opposition at 7. Here, Plaintiff relies on DMF ¶ 27, which cites to Plaintiff's exhibits 35, 40, 41 and 42. Each of these paragraphs provides testimony or declarations that there was a tape recorder present at the subject witness interview, and that it appeared that the interviewing detective pressed the record button when he began the interview, and flipped the tape during the interview. However, none of this evidence, some of which Defendant Longanbach objects to, provides any evidence that either Defendant Longanbach or O'Brien erased the tape. The Court therefore **GRANTS** Defendant Longanbach's motion for summary judgment as to the allegations relating to the cassette tape.

3. Complaint ¶ 66

This paragraph alleges that Defendant Longanbach suborned perjury by meeting with a witness prior to the preliminary hearing, telling her that in order to secure a

conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past. In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff relies on DMF ¶ 28, which purports to summarize the evidence offered in support of his allegation that Defendant Longanbach coerced her into committing perjury. This evidence consists largely of a transcript of the sworn testimony of the subject witness concerning her experience with Defendants Longanbach and O'Brien prior to the preliminary hearing. The testimony includes various statements that she felt pressured by these Defendants, as well as by the victim's family, to lie about what she saw on the night of the incident and about Mr. Harless' violent past. The Court finds that this evidence is a sufficient showing of fact to raise a genuine issue for trial, and therefore **DENIES** Defendant Longanbach's motion for summary judgment as to the allegations contained in the Complaint at ¶ 66, relating to Defendants Longanbach and O'Brien having unlawfully coerced the witness into testifying falsely prior to the preliminary hearing.

4. Complaint ¶ 88

This paragraph and those around it allege that during the 1996 trial, the defense (Plaintiff herein) tried to subpoena a police report (the "Belsan" report) from the San Diego Police Department concerning Plaintiff, which report would have weakened certain prosecution testimony regarding an alleged past violent act committed by Plaintiff. Plaintiff alleges that in response to the subpoena, the defense received a Certification of No Records, and that therefore Longanbach and O'Brien used their positions to remove the only available copies of a past

incident report involving Plaintiff during his first trial, thereby prejudicing him and preventing him from obtaining a fair trial.

In opposition to Defendant Longanbach's assertion that no evidence exists to support this allegation, Plaintiff argues that the report in question "was eventually disclosed to Genzler by the AGO. That document contains a fax confirmation line which indicates that the report was faxed to the 8th floor of the Hall of Justice, on June 4, 1996." Opposition at 8. Plaintiff relies upon DMF ¶ 44 which references his Exhibits 52 and 74. These exhibits, which Defendant Longanbach objects to, would demonstrate that the subject report might have been faxed to Defendant O'Brien during the 1996 proceeding, and that the report existed during the 1999 proceeding. Assuming these exhibits could withstand Defendant Longanbach's objections, they do not provide evidence that Defendants Longanbach or O'Brien "removed the only available copy" of the report. If O'Brien received a fax of the report, an original must have existed as well. The Court therefore **GRANTS** Defendant Longanbach's motion for summary judgment as to the allegations regarding the "Belsan" report.

III. Discussion of Individual Defendants' Motion for Summary Judgment

In contrast to Defendant Longanbach's motion, the memorandum in support of the Individual Defendants' motion is not specific as to which of Plaintiff's allegations they move for summary judgment, nor as to the specific grounds upon which they move as to each challenged allegation. The Individual Defendants appear to move

initially for "dismissal based on absolute or, alternatively, qualified immunity from liability in their individual capacities." Motion at 1. However, despite their broad request for "dismissal" on summary judgment, as best as the Court can ascertain from the pleadings, the Individual Defendants move for summary judgment based upon immunity only as it applies to the allegations against them contained in the Complaint at ¶¶ 52 through 94. Motion at 8. Upon examination of those paragraphs, the Court discerns 12 paragraphs which make specific allegations against Defendant O'Brien (Complaint at ¶¶ 57, 58, 59, 61, 64, 66, 70, 74, 83, 84, 88) and three paragraphs which make specific allegations against the other Individual Defendants (Complaint at ¶¶ 74, 81, 82). The Individual Defendants alternatively ask for summary adjudication of a list of 44 facts contained in their Notice of Motion at p.2-5 which they allege without any argument whatsoever are without substantial controversy. Motion at 2.

The Court will first discuss the Individual Defendants' immunity arguments as they apply to the specified allegations, and will then address their alternative request for adjudication of facts without substantial controversy.

1. Specific Allegations Against Defendant O'Brien

The allegations at issue against Defendant O'Brien can be broken down into the same categories as those described above: (i) hiding and/or withholding evidence (Complaint at ¶¶ 58, 61); (ii) presenting false testimony to the jury (Complaint at ¶¶ 70, 74, 83, 84); (iii) tampering with recorded witness statements and investigative reports (Complaint at ¶¶ 57, 58, 64, 88); and (iv) tampering with

and threatening witnesses and suborning perjury (Complaint at ¶¶ 59, 66, 83, 84).

Each of these allegations is discussed above. The sole question on this issue is whether absolute immunity as applied to Defendant O'Brien, an investigator employed by the District Attorney's office, is coextensive with its application to Defendant Longanbach. The Individual Defendants provide little legal argument on this point. They accurately state that "[o]f the four [Individual Defendants], only one, O'Brien, personally participated in [Plaintiff's] prosecution," and that "[i]nvestigators, like prosecutors and others helping to present the state's case, are entitled to prosecutorial immunity when engaged in functions intimately associated with the judicial phase of the criminal process." *See Cooper v. Parrish,* 203 F.3d 937, 950 (6th Cir. 2000)." Motion at 13.

Plaintiff's opposition is similarly devoid of persuasive argument on this point. Plaintiff's sole theory is that Defendant O'Brien should not be vested with absolute prosecutorial immunity for acts which disqualify Defendant Longanbach from such immunity. Insofar as the Court holds that those actions alleged to have been undertaken by Defendant Longanbach in categories one, two and four are protected by absolute immunity, this argument is without merit. The argument actually urges the Court to apply the same absolute immunity argument to Defendant O'Brien as it did to Defendant Longanbach. The Court will do so. Simply because Defendant O'Brien is labeled an "investigator" does not mean that his actions, allegedly taken pursuant to the direct orders of prosecutor Longanbach, are de facto "investigatory" in nature. On the contrary, logic dictates that because the actions are identical to those alleged against Defendant Longanbach the

Court should apply its holding equally. The Court therefore **GRANTS** Defendant O'Brien's motion as to the allegations listed above under categories one, two and four, with the exception of the allegations contained in the Complaint at ¶ 66, and **GRANTS** Defendant O'Brien's motion for summary judgment as to the allegations under category three as discussed above.

2. Specific Allegations Against Other Individual Defendants

The remaining Individual Defendants move for summary judgment upon the allegations contained in the Complaint at ¶¶ 74, 81, 82. Those allegations are that Defendants Pfingst, Thompson and Pippen, who supervised Defendant Longanbach but were allegedly not directly involved in Plaintiff's prosecution: (i) knew that Defendant Longanbach granted a prosecution witness immunity in exchange for perjured testimony favorable to the prosecution, which immunity shielded the witness from prosecution for perjury and for future acts of lying on the stand at Plaintiff's trial, Complaint ¶ 74; (ii) had been promised by Defendant Longanbach that he would secure a conviction, Complaint at ¶ 81; and (iii) were aware of and condoned Defendant Longanbach's ploy to get Plaintiff's attorney to recuse himself, complaint at ¶ 82. To their detriment, Defendants Pfingst, Thompson and Pippen offer absolutely no argument or legal authority to support the proposition that absolute prosecutorial immunity applies to supervisors in the prosecutor's office for the alleged acts of a prosecutor. They similarly neglect to provide any particularized argument or legal authority as to how the Court should apply witness immunity or qualified immunity to them in their supervisory role.

Because they have failed to provide any argument or authority on these dispositive issues, their motions are **DENIED**.

3. Adjudication of Fact Without Substantial Controversy

Similarly, because (i) the Individual Defendants provide absolutely no argument in support of their request for summary adjudication, instead simply listing 44 facts and alleging they are without substantial controversy, and (ii) for purposes of summary judgment, they have the initial burden of showing the Court that there is an absence of evidence to support the nonmovant's case and have failed to meet this burden, (iii) the Court **DENIES** their motion for summary adjudication as to their list of 44 alleged facts.

IV. Conclusion

For the foregoing reasons, Defendants' motions for summary judgment are **GRANTED** in part and **DENIED** in part.

IT IS SO ORDERED.

8/13/02 /s/ Judith N. Keep
Date **Judge Judith N. Keep**
United States District Court
Southern District of California

CC: ALL PARTIES
MAGISTRATE JUDGE JOHN A. HOUSTON

THE PEOPLE, Plaintiff and Respondent, v. DAVID JAMES GENZLER, Defendant and Appellant.

D036646

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2002 Cal. App. Unpub. LEXIS 99

April 16, 2002, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

JUDGES: KREMER, P.J. WE CONCUR: BENKE, J., HUFFMAN, J.

OPINION BY: KREMER

OPINION:

Following a second trial on charges of second degree murder and assault with a deadly weapon, David James Genzler was convicted by a jury of involuntary manslaughter of Dustin Harless with the personal use of a deadly weapon (Pen. Code, § 192, subd. (b)),[1] a lesser included offense of the charged offense of murder (§ 187,

[1] All statutory references are to the Penal Code unless otherwise specified.

subd. (a)), and assault with a deadly weapon (§ 245, subd. (a)(1)) on Scott Davis. The jury also found that Genzler personally used a deadly weapon in commission of the involuntary manslaughter (§ 12022, subd. (b)). The court sentenced Genzler to a prison term of six years: the upper term of four years for the involuntary manslaughter, a consecutive one-year term for the use of a deadly weapon, and a one-year consecutive term (one-third the midterm) for the assault with a deadly weapon.

On appeal, Genzler contends the evidence is insufficient to support his conviction of assault with a deadly weapon, the trial court erred in refusing to instruct on brandishing a weapon as a lesser included offense of assault with a deadly weapon, prosecutorial misconduct occurring prior to and during Genzler's first trial requires dismissal of all the charges, and the court erred in imposing the upper term for the assault with a deadly weapon. We affirm.

FACTS

Involuntary Manslaughter

On the evening of April 17/18, 1996, Harless and his girlfriend, Sky Flanders, spent the evening in Ocean Beach, going to bars and visiting with friends. During the evening, both Harless and Flanders had been drinking and had smoked marijuana.[2] About 2:30 a.m., they arrived at the intersection of Voltaire and Cable Streets on their way to get a cab to go home. Because the weather was chilly

[2] It was unclear whether Flanders also smoked marijuana.

and misty, Harless paused at the corner to button up his shirt. Flanders continued across the intersection.

As Flanders waited on the opposite side of the intersection, Genzler drove up to the intersection, rolled down the window of his car and said to her, "Hey, baby, you want a ride?" She said no, but Genzler kept asking; Flanders pointed toward Harless to let Genzler know that she was not alone. By the time Genzler looked toward Harless, Harless was knocking on Genzler's driver's side window. According to Flanders, Genzler appeared "kind of shocked that someone was standing there." Genzler flung open his door, took off his glasses, threw them in his car, put his hands in the air and repeatedly said, "What's up? You want some, mother-fucker?"

Meanwhile, Scott Davis had driven up to the intersection behind Genzler's car. Davis saw Genzler open his door, take off his glasses, throw them in the car and "take a bee line straight for" Harless. Genzler was screaming profanities.

According to Davis, Genzler punched Harless in the right temple so hard that Harless fell back and the beer bottles Harless was carrying went flying. Genzler punched Harless again and both went to the ground with Genzler on the top. Davis saw Genzler pull out a knife and stab downwards into Harless's chest. Davis pulled Genzler off Harless. Harless walked a short distance before collapsing.

At trial, Flanders testified she remembered perhaps the first punch when Genzler hit Harless, but she did not see the rest of the fight or the stabbing because she was distracted by Davis's arrival. She thought she remembered seeing Davis pulling Genzler off Harless. On the day of the stabbing, she had told the police that Harless and Genzler

had exchanged punches, Harless had "flipped" Genzler, and Genzler had stabbed Harless while Harless was on the top and would not let Genzler get up. Flanders repeated this story to about 20 people, but after talking with the prosecutor for the first trial, Peter Longanbach, and his investigator, William J. O'Brien, Flanders came to believe that she had not actually witnessed any details of the fight or the stabbing.

According to Genzler, Harless had opened the door to the car and Genzler got out to be in a better position to protect himself. Genzler threw his glasses into the car. Genzler raised up his hands, palms forward, and yelled at Harless, "Back off, mother-f'er." Harless charged Genzler and Genzler began to punch Harless in the face. Harless grabbed Genzler, slammed him face down to the ground and pinned his arm to his right side. Davis then came up and started kicking at Genzler's head. Genzler was able to deflect some of the kicks with his left arm. Harless then put his fingers in Genzler's left eye and pulled his head back, exposing his face and neck. Afraid that he was going to be kicked in the neck or face, Genzler reached for a knife he carried in his pocket, opened it, and jabbed once, reaching over his right shoulder toward Harless. As soon as Genzler jabbed with his knife, Harless released his hold on Genzler's eye and Harless got off Genzler. Harless walked a short distance and collapsed to the ground.

Harless died as a result of a four-inch stab wound that cut his aorta.

Conflicting evidence was presented as to whether the stab wound and the blood splatter evidence was consistent with Genzler's version – where he stabbed upwards while laying face down on the ground, or consistent with Davis's

version – where Genzler stabbed Harless from above while Genzler was on top of Harless.

Evidence was presented that Genzler did not have wounds consistent with his story that Harless gouged his eye and Davis kicked his arm and head. After he left the scene, Genzler did not notice any injuries when he looked at himself in the mirror and took a shower. While Genzler was at an attorney's office prior to turning himself in to the police, his attorney pointed out a bruise on the side of his head and a scratch on the side of his nose near his left eye. Photographs of Genzler taken at the police station on April 19 do not show any redness or swelling in his eyes and Genzler did not recall any swelling. An expert testified the photograph of Genzler showed only minor injuries and were inconsistent with his testimony. If Genzler's eye had been gouged, his eyelid would be swollen shut, he would have had redness for five to seven days, his vision would be impaired, and he would have had a very painful scratched cornea.

Assault with a Deadly Weapon

After the stabbing, Genzler approached Davis, slashed his knife within eight to ten inches of Davis's face and said, "Come on, mother-fucker. You want some of this, too? Come on, mother-fucker." Davis was scared; he did not want to be cut. The knife came so close that Davis believed if he had not moved back, he would have been cut by the knife. Davis backed up toward his van. Genzler followed Davis, continuing to scream, and to slash and jab the knife. When Davis reached the back of Genzler's car, he turned and ran to his van, got in the driver's seat and locked the doors. Genzler jumped on the bumper of the van

and beat on the van's windshield with the butt end of his knife while screaming, "Get out, mother-fucker. Get out. I'll kill you, too, mother-fucker. You want some of this?"[3] Davis put the van in reverse whereupon Genzler slipped off the bumper because it was wet; Davis backed up, drove around Genzler and went to a 7-Eleven where he had the clerk dial 911.

Flanders witnessed Genzler chasing Davis, screaming and pounding on the van. A passing motorist and a man who worked in a nearby office also saw Genzler pounding on the van.

According to Genzler, after Harless walked away, Davis started kicking him. While on the ground, Genzler waved his knife back and forth at Davis and yelled, "You want some of this, mother-f'er?" so that Davis would be afraid and stay away. As Genzler got up, Davis ran to his van but did not leave, so Genzler pounded on the window of the van. Genzler's intent was to scare Davis so Davis would leave and then Genzler would be able to leave.

After Davis left, Genzler drove quickly away. Flanders was able to get the license number and stopped a passing motorist who wrote down the number. The license plate was traced to Genzler's mother who told police Genzler sometimes borrowed her car.

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[3] This retrial was the first time Davis had testified that Genzler threatened to kill Davis. Also for the first time, Davis testified that Genzler initially went to the passenger side of the van and tried to open the passenger side door.

Genzler's Subsequent Conduct

After the stabbing and assault, Genzler drove two or three blocks to the house of a woman he was dating. He called his brother to come and get the bloody clothes; then he took the bloody clothes off, placed them on the couch and took a shower. Genzler's brother arrived while Genzler was in the shower; he put the clothes in a plastic bag and left. Genzler's knife and wallet were in the clothes.

The next day Genzler missed his first college class but attended the others. One of his classmates who spent time one-on-one with Genzler in a class did not notice any injuries on Genzler that day. Genzler then went to his brother's motel room where, allegedly at his brother's suggestion, Genzler shaved his head to alter his appearance. Genzler testified that shortly after he shaved his head, he learned from a television news report that Harless had died.

There was also evidence that Genzler claimed he had left the car that he had been driving the night of the stabbing near his brother's motel room, but the car was parked in another area – a street in a quiet, limited-access residential area that Genzler was familiar with.

Genzler eventually turned himself in to the police.

Evidence of Harless's Wrestling Abilities and Propensity for Violence

Harless was an accomplished wrestler and had been a champion wrestler at both the high school and college levels. He rarely lost his matches, even if his opponents were larger. Harless's college wrestling coach testified Harless was one of the best wrestlers he had ever coached

and was a two-time All-American college wrestler. The coach believed that a wrestler in a street fight would get into a wrestler's stance and attack his opponent's legs instead of trying to punch his opponent. Harless used wrestling moves in street fights and was the type of person who would win a fight if no weapons were involved.

Flanders testified Harless was a "protective boyfriend" who would not allow men to say rude things to her or try to pick her up when he was present. Flanders testified that she had seen Harless in two fights. At Tony's bar in Ocean Beach, a man made a lewd comment to her as she was leaving the restroom. She repeated the comment to Harless, who asked the man to step outside. Harless and the man went outside. Flanders went outside and saw Harless on top of the man punching him in the face. The second fight occurred within six months of the fight at Tony's, in the parking lot of a restaurant. Someone came into the restaurant and told Harless that one of their friends was being beaten; Harless left the restaurant and joined the fight. Flanders also testified that when she was living with Harless there was one time she ran from him to someone else for protection from Harless.

Flanders told Longanbach, the prosecutor during the first trial, about both incidents. He suggested she should keep out negative instances of Harless's character in order to strengthen the case.

Several other witnesses testified about Harless's prior violent acts, angry exchanges, and his reputation as a fighter. A social acquaintance of Harless testified he had seen Harless in three fights; each fight was quick, with Harless using wrestling moves to drop his opponents to the ground. This witness testified Harless was an efficient

fighter with a short temper, had a reputation as a competent fighter and was "a take-down artist," but that Harless would not beat his opponent once his opponent was no longer a threat. Another witness testified about two incidents involving Harless and Flanders. During the first incident the witness and Flanders had nodded at each other from across the street. Harless came up to the witness, yelled profanities and said he would kick the witness's ass if he caught him with his "fucking old lady." In the other incident, the witness commented to Flanders that she was looking pretty good; Harless started talking "shit" in the witness's face, telling him not to look at Flanders. The witness grabbed Harless by the neck and told him, "Pussy going to be the reason you die." The witness backed up. Flanders got in the middle and asked Harless to "leave it alone."

Harless's half-brother testified about two incidents. In 1994, when Harless was riding in the half-brother's cab, Harless jumped out of the cab, grabbed a man, threw him to the ground, and said the next time he would kill him (the half-brother did not believe Harless meant this). Then, laughing, Harless got back in the cab. On the other occasion, two men walked down the street; one man spat in the direction of the cab, one man brushed against the half-brother. Harless grabbed one of the men from behind and threw him down while the other man ran away.

Other witnesses testified about seeing Harless in 10 or more fights; seeing Harless with marks on his face, such as a fat lip or black eye, between 10 and 20 times over a 10-year period; and that Harless would fight if someone made a comment to Flanders.

Evidence of Genzler's Propensity for Violence

In June 1995, after Genzler had been out drinking with a friend and they were about to pull out of the parking lot of a nightclub, Genzler said in a loud voice to three men who were walking by, "What are you looking at, you want some?" The men had not done or said anything to provoke the statement. Genzler's friend believed Genzler wanted to fight, which made the friend nervous and he drove away.

In March 1996 Genzler was staying at a motel. About 10:00 p.m., one of the other motel guests, a Mr. Grenier, complained to Genzler about noise and asked Genzler to keep the noise down. Genzler responded, "Fuck you, old man." As Grenier approached the top of the stairs, Genzler went "ape shit" punching windmill-style and kicking. Grenier deflected the blows and started down the stairs. As he looked over his right shoulder, Genzler punched him in the nose. When Grenier got to the bottom of the steps, he threatened to come back with friends if it turned out his nose was broken, to which Genzler replied, "Nobody comes up on me – come back on me" and "I'll probably stick you in your fucking neck and kill you."

DISCUSSION

I

Sufficiency of the Evidence Assault With a Deadly Weapon

Genzler contends the evidence is insufficient to support his conviction of assault with a deadly weapon on Davis. He contends the evidence shows that he "displayed the weapon only in an attempt to scare Davis off" so he could "leave the scene of the altercation." He contends the

evidence was "not sufficient to show he intended to actually commit an act likely to result in physical force against Davis." Genzler asserts that the jury's verdict of involuntary manslaughter rather than second degree murder establishes that the jury found Davis's testimony not credible and, therefore, Davis's testimony cannot be relied on to supply substantial evidence to support the assault conviction.

Initially, we note that Genzler's argument that we must reject Davis's testimony about the assault because the jury rejected Davis's testimony about the stabbing is without merit. A jury is entitled to believe one part of a witness's testimony while rejecting other parts of the testimony. The jury here was entitled to disbelieve all or part of Davis's account of the stabbing but to accept as true Davis's testimony about the assault, particularly since Davis's testimony about Genzler's post-stabbing conduct was corroborated, at least in part, by three other witnesses. Moreover, we find Genzler's argument unpersuasive because the rules of appellate review require that we accept as true the evidence favorable to the judgment. (*People v. Bolin* (1998) 18 Cal.4th 297, 331, 956 P.2d 374; *People v. Jennings* (1991) 53 Cal.3d 334, 364, 279 Cal. Rptr. 780, 807 P.2d 1009.) Davis's testimony is favorable to the judgment and therefore we must accept it as true. Davis's testimony provided ample evidence to support an assault conviction.

"Assault and assault with a deadly weapon are general intent crimes." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1220, 970 P.2d 409.) "Specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent." (*People v. Williams* (2001) 26 Cal.4th 779, 786.) "Assault only requires an

intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) It has long been held that "'[a] threatened act may amount to an assault even though the threat is conditional or qualified.'" (*People v. Daniels* (1993) 18 Cal.App.4th 1046, 1051; *People v. McMakin* (1857) 8 Cal. 547, 548; *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570-571.) As our Supreme Court explained nearly 150 years ago: "Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he had actually struck, or shot, at the other party, and missed him." (*People v. McMakin, supra,* at pp. 548-549.) It is not necessary that an injury be inflicted, but rather the intent is merely to do a violent act; "once the violence is commenced, 'the assault is complete.'" (*People v. Colantuono* (1994) 7 Cal.4th 206, 219, 865 P.2d 704.)

Genzler does not contend that his slashing of the knife was not intentional. The jury was entitled to disbelieve Genzler's testimony that he only intended to scare Davis. The jury could have concluded that Genzler would have harmed Davis if Davis had not left the scene. Genzler argues that Davis's testimony that Genzler did not attempt to rush Davis or close the gap as Davis moved backwards, i.e., that Genzler kept his distance and did not approach closer, "is consistent with [an] argument that [Genzler] intended only to force Davis away so that he could flee the scene." The evidence, however, is also

consistent with a finding that Genzler intended to force Davis away not merely by brandishing the knife, but by using it (as he had on Harless) to harm Davis if Davis failed to comply with Genzler's implicit demand that Davis leave the scene. As noted above, a conditional threat and evidence showing a willingness to use a weapon if a victim does not comply is sufficient to support a finding of assault with a deadly weapon.

No reversal is merited on this ground.

II

Instructions on Brandishing

Genzler contends the court erred in refusing to instruct the jury on the misdemeanor of brandishing a weapon (§ 417) because, he asserts, brandishing was a lesser included offense of the charged assault with a deadly weapon.

The trial court has a duty to instruct the jury on principles of law that are closely and openly connected with the evidence and necessary to the jury's understanding of the case. (*People v. Kimble* (1988) 44 Cal.3d 480, 503, 244 Cal. Rptr. 148, 749 P.2d 803.) This duty includes giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. (*People v. Williams* (1988) 199 Cal. App. 3d 469, 475, 245 Cal. Rptr. 61.)

"[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense,

such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117, 960 P.2d 1073.) The determination that an offense is a lesser included offense of a charged offense is determined in the abstract; "the evidence actually introduced at trial is irrelevant to the determination of the status of an offense as lesser included." (*People v. Wright* (1996) 52 Cal.App.4th 203, 208; *People v. Moore* (1983) 143 Cal. App. 3d 1059, 1067, 192 Cal. Rptr. 374.)[4]

The offense of brandishing a firearm is defined in section 417, subdivision (a)(1) as follows:

"Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses [the same] in any fight or quarrel is guilty of a misdemeanor . . . ."

It has long been established under the legal elements test that brandishing is not a lesser included offense of assault with a deadly weapon. (*See*, e.g., *People v. Steele* (2000) 83 Cal.App.4th 212, 218; *People v. Escarcega* (1974) 43 Cal. App. 3d 391, 398, 117 Cal. Rptr. 595; *People v. Torres* (1957) 151 Cal. App. 2d 542, 544-545, 312 P.2d 9.) An assault with a deadly weapon may theoretically be committed without drawing or exhibiting the weapon in a rude, angry or threatening manner or by using it in an argument or fight. For example, an individual could

[4] To the extent Genzler argues based on the evidence presented at trial, he ignores the rules that determination whether an offense is a lesser included offense depends upon an examination of the offenses in the abstract.

commit an assault with a deadly weapon (such as a knife) by approaching the victim from the back so that the victim never had an opportunity to see the weapon. Brandishing has been held to be a lesser related offense. (*People v. Steele, supra,* at p. 218.) As Genzler acknowledges, a defendant does not have a unilateral right to an instruction on a lesser related instruction. (*People v. Birks, supra,* 19 Cal.4th 108, 136.) The prosecutor here did not agree to the instruction.

Genzler asserts brandishing was a lesser included offense of assault with a deadly weapon as it was charged in this case, but does not explain how the accusatory pleading described the crime of assault with a deadly weapon in such a way that if committed in the manner described, the lesser offense of brandishing must necessarily have been committed. The allegations here are very general. They do not even designate that the deadly weapon was a knife and do not refer to drawing or exhibiting the weapon in a rude, angry or threatening manner or state that the weapon was used during a fight or quarrel. The allegations in this case do not transform brandishing into a lesser included offense.

No reversal is merited on this ground.

III

Prosecutorial Misconduct

Genzler contends that prosecutorial misconduct occurring prior to and during the first trial require dismissal of all the charges.

Genzler's first trial resulted in convictions of second degree murder and assault with a deadly weapon. We

reversed on the basis Genzler was improperly denied his right to proceed with the retained counsel of his choice. (*People v. Genzler* (Oct. 28, 1998, D028150) [nonpub. opn.].)[5] Prior to the retrial, the district attorney's office sought to voluntarily recuse itself from further prosecution of the case due to allegations that the prosecutor in the first trial, Deputy District Attorney Peter Longanbach, had withheld information from the defense about Harless's prior violent confrontations and had encouraged Flanders to conceal that information during the first trial. Thereafter the Attorney General assumed responsibility for prosecuting the case. Genzler filed a motion to dismiss all charges based on misconduct committed by Longanbach and his investigator. An extensive evidentiary hearing was held. At the end of the hearing, the court denied the motion to dismiss. Genzler renewed his motion to dismiss at the retrial after presentation of the prosecution's case-in-chief and at the close of evidence, both of which were denied.

At the second trial, evidence of Harless's violent tendencies and prior fights was presented to the jury through a number of different witnesses. Flanders testified under a grant of immunity. She was examined in

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[5] In the first trial, the prosecutor moved to recuse Genzler's retained counsel on the basis a conflict of interest existed because counsel might be called to testify at trial about how certain evidence (Genzler's bloody clothing and the knife used in the stabbing) were delivered to the defense and then turned over to the prosecution. We held the court erred in finding that defense counsel would be an inevitable witness and would testify about critical matters and in not allowing Genzler to waive any potential conflicts of interest. We found that defense counsel's testimony would likely not be necessary and related to a minor, collateral matter. As it turned out, defense counsel was not called to testify.

detail about what she told Longanbach and his investigator O'Brien, including that they had indicated it would be best for the case for her to minimize negative information about Harless and his prior violent confrontations. She was examined in detail about how she had changed her initial version of the incident after talking with Longanbach and O'Brien from one where she had seen Harless and Genzler exchanging punches, Harless flipping Genzler and Harless being on top of Genzler on the ground, to a version where she saw essentially nothing of the fight and stabbing. While Flanders testified that she changed her version because she realized she could not have seen things she had initially stated she saw,[6] a reasonable inference was that Flanders changed her story as a result of improper suggestions by Longanbach and O'Brien as to what she had actually seen or not seen – suggestions intended not to get at the truth but to strengthen their case against Genzler. During her testimony at the second trial, Flanders a number of times indicated an uncertainty as to what she had actually witnessed.

The Attorney General does not dispute that Longanbach committed misconduct in failing to turn over exculpatory matter relating to Harless's history of violent conduct. (*See Brady v. Maryland* (1963) 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194.) For the sake of this argument, we assume that Longanbach also improperly encouraged Flanders to be evasive or to lie in the first trial about Harless's violent conduct, and improperly suggested to Flanders that she change her story. Even conceding that

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[6] Flanders also testified that she had started questioning what she had actually seen immediately after the incident and had been doing so continuously since then.

all of this prosecutorial misconduct occurred, conduct which cannot be condoned, we conclude that dismissal of the charges is not the proper remedy; the proper remedy was the retrial that Genzler received.

As we recently explained in *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1387, "dismissal of charges is an extraordinary remedy [for prosecutorial misconduct], which is reserved for the few cases where conduct by the prosecution has completely eliminated the possibility of a fair retrial." Prosecutorial misconduct warrants dismissal only when a fair retrial would be impossible or when the defendant "'has effectively been acquitted of the offense in question.'" (*Id.* at p. 1388.) Such is not the case here.

Here, a fair retrial was possible and, in fact, occurred. Prior to the retrial, the prosecution disclosed evidence of Harless's prior violent conduct. During the retrial Genzler was able to impeach Flanders, a key prosecution witness, by bringing out evidence that she had suppressed evidence of Harless's violent confrontations in the first trial and had changed her version of what occurred after talking to Longanbach and his investigator. Genzler was also able to present Flanders's original version as told to the police shortly after the incident; her interview had been videotaped and was played before the jury.

Genzler nonetheless contends that Longanbach's "actions before and during the first trial so influenced Flanders that it became impossible for her to be completely truthful as to what had really occurred." He asserts that "while Flanders provided sufficient testimony to debunk the obviously rejected rendition of events as presented by Davis," Genzler asserts that if Flanders had testified completely candidly, her testimony would have

shown that Genzler "was (1) ordered out of his car by an intoxicated, agitated Harless, (2) almost immediately thereafter taken down by use of a wrestling move which Flanders knew all too well and had seen on many occasions, and (3) Harless immediately had appellant in fear for his life, particularly after the arrival of Davis."

Initially, we note that much of Genzler's argument is based on speculation. Genzler merely speculates that Flanders would have testified that Harless opened the door to Genzler's car. He cites nothing in the record to support such a conclusion; Flanders consistently stated that Genzler opened his car door, threw down his glasses and stepped out.[7] Further, this testimony was corroborated by Davis who also saw Genzler open his car door, throw down his glasses and step out.

As to Genzler's assertion that Flanders would have testified that "Harless immediately had [Genzler] in fear for his life, particularly after the arrival of Davis," this testimony is also based on sheer speculation and, moreover, would require that Flanders had the ability to read Genzler's mind. Nothing in the record suggests that Flanders had any knowledge indicating that Harless had killed or nearly killed anyone in a street fight. Nothing in the record suggests that Flanders knew or should have known that Harless was inflicting potentially fatal blows, particularly since the confrontation here was of a short duration.

Moreover, as Genzler concedes, Flanders's more truthful testimony in the second trial as well as the

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[7] One witness told an investigator that Harless, after knocking on Genzler's window, told Genzler to "get out of the car."

disclosure of Harless's propensity for violence, resulted in a conviction of involuntary manslaughter rather than second degree murder. We believe the jury's rejection of Genzler's self-defense claim was not due to any misconduct occurring before or during the first trial but was because Genzler's claim that Harless was gouging his eye and Davis was kicking his head and arm were inconsistent with the physical evidence, i.e., the evidence overwhelmingly established Genzler did not suffer any injuries consistent with his claims. Genzler's conviction of involuntary manslaughter was the least possible offense under the circumstances of the case. We do not see any reasonable possibility, given the facts of this case, that the jury would have acquitted Genzler of any and all wrongdoing even if the asserted prosecutorial misconduct had not occurred. It is clear the jury's verdict was based on the evidence properly presented at the retrial and was not the result of any taint flowing from misconduct relating to the first trial.

Finally, Genzler contends dismissal is "appropriate in this case as a deterrent" to prevent similar such prosecutorial misconduct in the future. He relies on *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 157 Cal. Rptr. 658, 598 P.2d 818. *Barber* was an extraordinary case where the misconduct consisted of an undercover police officer who posed as a codefendant and sat in on confidential attorney-client discussions. In *Barber*, after finding that it would not be possible for the defendant to have a fair retrial, the court, in dicta, noted that a remedy of excluding the improperly obtained information in a retrial would not provide a sufficient incentive for state agents to refrain from such conduct in the future. (*Id.* at pp. 756-760.) *Barber* does not stand for the proposition that a dismissal

should be granted to detér future prosecutorial misconduct where it is possible to have a fair retrial. *Barber*'s deterrent rationale was an additional reason, based on the facts of that case which involved a Sixth Amendment violation, the difficulty of assessing the prejudice flowing from the violation and the impossibility of a fair retrial. Genzler's case does not involve a violation of his Sixth Amendment right to counsel nor a situation where the prejudice is impossible to assess. Moreover, a fair retrial was possible and, in fact, a fair retrial occurred. This is not the extraordinary case where dismissal of the charges is the appropriate remedy.

No reversal is merited on this ground.

IV

Imposition of Upper Term for Involuntary Manslaughter

Genzler contends the court erred in imposing the upper, rather than middle, term for his conviction of involuntary manslaughter. He contends "the factors in aggravation used by the court in some respect ignore or are at least contrary to the clear import of the jury's verdict finding [him] guilty of the lesser offense of involuntary manslaughter."[8]

To impose the upper term, the sentencing court must find factors in aggravation outweigh those in mitigation. (Cal. Rules of Court, rule 420.)[9] There is no requirement

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[8] The Attorney General argues Genzler waived any claims of error by failing to object. We find no waiver. Genzler clearly indicated to the court below that he believed the midterm was appropriate in this case.

[9] All rule references are to the California Rules of Court unless otherwise specified.

the court indicate its reasons for rejecting mitigating factors on the record. (*People v. Charron* (1987) 193 Cal. App. 3d 981, 994, 238 Cal. Rptr. 660.) A single factor in aggravation is sufficient to support imposition of the upper term. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1758; *People v. Thomas* (1990) 219 Cal. App. 3d 134, 149, 267 Cal. Rptr. 908.) Absent a clear showing the sentencing decision was arbitrary or irrational, it is presumed the trial court acted to achieve legitimate sentencing objectives. (*People v. Giminez* (1975) 14 Cal.3d 68, 72, 120 Cal. Rptr. 577, 534 P.2d 65; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) If the court relied on an improper factor to impose the upper term, remand for resentencing is required only if "'"it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." [Citation.]'" (*People v. Avalos* (1984) 37 Cal.3d 216, 233, 207 Cal. Rptr. 549, 689 P.2d 121.)

Here, the court found no mitigating factors of any significant weight. The court found three aggravating factors: (1) Genzler was a danger to society (rule 421(b)(1)); (2) Genzler's past performance on probation was poor (rule 421(b)(5)); and (3) Genzler exhibited a high degree of callousness (rule 421(a)(1)). The court's finding that Genzler was a danger to society was based on evidence presented at trial showing Genzler engaged in violent or potentially violent conduct on two prior occasions, on his criminal record showing other violent conduct, and on evidence showing Genzler had an affinity for weapons.[10]

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[10] The weapons included the knife Genzler was carrying in this case as well as a BB gun, a club with a taped handle, a large knife,

(Continued on following page)

As to the high degree of callousness, the court noted that Genzler was aware he had inflicted a serious wound (although not necessarily a fatal wound) and yet did not attempt to render any aid to Harless or to even make an anonymous call to 911. The court found it "rather appallingly cold" that Genzler had not attempted to get any help for Harless "or do something other than just go off to his girlfriend's and be worried about his classes the next day at the college."

Genzler contends the court improperly relied on callousness as an aggravating factor because, he asserts, the evidence showed he did not know he had inflicted a serious injury and there was evidence showing he was "extremely distraught when he found out the following afternoon that Mr. Harless had died as a result of the wound."[11] The court, however, could reasonably find Genzler knew he had inflicted a potentially serious wound on the basis that a stab wound, in and of itself, is serious, or that Harless immediately stopped fighting after the stabbing, or on the basis that Genzler must have known given his knowledge that his clothes were covered with blood and his attempt to dispose of them. The court was entitled to give little significance to evidence that Genzler was extremely distraught, on the basis Genzler's mental state reflected self-pity for himself rather than remorse or sadness for Harless, Flanders and Harless's friends and family.

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brass knuckles, nun-chuks, and a switch-blade that had been involved in Genzler's juvenile cases.

[11] Genzler provides a citation to the record to support this assertion but the record at this page does not contain any testimony about Genzler being extremely distraught.

Genzler asserts his "fleeing the scene was not an act of callousness but, rather, simply an attempt to flee." Genzler points to the jury's finding he had not intended to kill Harless, and to evidence that he "had been confronted, not only by Harless, but by his friend Scott Davis." He also points out that "Sky Flanders was still present and other people could reasonably be expected upon the scene shortly." As we noted above, there was substantial evidence to support a finding that Genzler did not merely intend to scare Davis, but instead assaulted Davis with a deadly weapon. There was no evidence that Flanders presented a threat. Further, Genzler's focus on fleeing the scene is consistent with the court's finding of callousness, i.e., Genzler's lack of concern for a person he had just seriously injured. Further, even if we were to agree that callousness was an improper factor, we would not reverse because the upper term was also supported by evidence showing Genzler was a danger to society and had performed poorly on probation.

Genzler also argues there were "mitigating factors which, at a minimum, would offset the factors in aggravation to an extent making the mid-term the proper sentence choice" and points, inter alia, to the jury's finding that he had not intended to kill Harless. The court, however, was entitled to give little significance to this factor. As the court observed, this factor was subsumed in the jury's finding acquitting Genzler of second degree murder and convicting him only of involuntary manslaughter.

No reversal is merited on this ground.

DISPOSITION

The judgment is affirmed.

KREMER, P.J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID GENZLER, Plaintiff, v. PETER LONGANBACH, an individual; JEFFREY O'BRIEN, an individual, GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity; and DOES 1 through 100, inclusive, Defendants.	Case No. 01 CV 1462 K (JAH) **FIRST AMENDED COMPLAINT FOR DAMAGES** DEMAND FOR JURY TRIAL 1. Violation of Civil Rights – 42 U.S.C. 1983 2. Conspiracy to Violate Civil Rights – 42 U.S.C. 1983; 3. Negligent Hiring; 4. Negligent Supervision; 5. Aiding and Abetting; 6. Aiding and Abetting; 7. Civil Rights Violation – CC § 52.1 8. Conspiracy to Violate – CC § 52.1; 9. Intentional Infliction of Emotional Distress; 10. Negligent Infliction of Emotional Distress

(Filed Aug. 24, 2001)

There is an old maxim which states that: *"The Prosecution delights in acquittal as much as conviction."* This maxim is based on the principle that it is the ethical duty of a prosecutor to seek justice and not merely convict. The defendants in this case have made a mockery of this principle.

GENERAL OVERVIEW

This case involves a prosecutor who would stop at nothing to get what he wanted, including engaging in criminal conduct in order to secure a conviction, even if the person was innocent of the charge. The prosecutor was known within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE as someone who was unethical and used illegal tactics. He was known to be dishonest and untrustworthy by the judiciary. But because he got convictions using these tactics, the most senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE did nothing to rein him in. Instead they established a secret, unwritten custom and practice whereby such conduct was not only tolerated and condoned, it was rewarded. In violation of clearly established constitutional and statutory rights, and in contravention of explicit policies of the SAN DIEGO DISTRICT ATTORNEY'S OFFICE, the individual defendants named herein tolerated, condoned, rewarded or participated in the concealment of exculpatory evidence, the fabrication of false evidence, improper witness tampering and subornation of perjury. In the past six years, this unofficial custom and practice has lead to an unprecedented number of highly publicized scandals that have severely damaged the reputation of the SAN DIEGO COUNTY DISTRICT

ATTORNEY'S OFFICE and the perception of justice in the County. Plaintiff, DAVID GENZLER, was a victim of this unofficial custom and practice that led to his being wrongfully convicted and sentenced to 20 years to life in prison.

Plaintiff, DAVID GENZLER, alleges as follows:

1. Jurisdiction and venue are proper in this Court because all claims arise out of 42 U.S.C. section 1983, and all events occurred in this venue and most witnesses and parties either reside in this venue or are governmental entities which acted within this venue.

2. Plaintiff demands a jury trial of the matters set forth herein.

3. Plaintiff, DAVID GENZLER (hereinafter "GENZLER") is a citizen of the United States who was (except for those times specifically set forth herein) and is, at all times relevant, a resident of the county of San Diego, California.

4. GENZLER was born on November 3, 1970.

5. The COUNTY OF SAN DIEGO, is a governmental entity organized under the laws and constitution of the state of California. The COUNTY OF SAN DIEGO is sued herein in its capacity as the governmental entity with ultimate responsibility for the non-prosecutorial functions and day to day operations of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, including that office's administrative functions of hiring, firing, compensation, promotion, discipline and assignment of its employees.

6. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE is a subdivision of the COUNTY OF SAN DIEGO and is sued herein as an agent of SAN DIEGO

COUNTY in its day to day administration of the office, particularly with respect to the hiring, firing, compensation, promotion, discipline and assigning of employees of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. Through its hiring, firing, compensation, promotion, job assignments and failure to discipline, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE at all times mentioned herein maintained and fostered the customs and practices which gave rise to the injuries complained of herein including, but not limited to, the custom and practice of hiding, destroying and/or suppressing evidence, as well as creating false evidence during the investigatory phases of a criminal action, and suppressing evidence which would be exculpatory to a person accused of or suspected in a criminal action and/or proceeding.

7. Plaintiff is informed and believes, and thereon alleges, that PETER LONGANBACH (hereinafter "LONGANBACH") was at all times mentioned herein, a Deputy District Attorney (hereinafter "DDA") employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, LONGANBACH was acting within the scope of his employment as a DDA and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. LONGANBACH is sued in his individual capacity for the acts set forth herein.

8. Plaintiff is informed and believes, and thereon alleges, that JEFFREY O'BRIEN (hereinafter "O'BRIEN") was at all times mentioned herein, an investigator employed by or with the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, At some times relevant hereto O'BRIEN was acting within the scope of his employment

as a District Attorney investigator and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. O'BRIEN is sued in his individual capacity for the acts set forth below.

9. Plaintiff is informed and believes, and thereon alleges, that GREGORY THOMPSON (hereinafter "THOMPSON") was at all times mentioned herein, a DDA employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, THOMPSON was acting within the scope of his employment as a DDA and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. THOMPSON is being named in his individual capacity for participation in the acts set forth below.

10. Plaintiff is informed and believes, and thereon alleges, that JAMES PIPPEN (hereinafter "PIPPEN") was at all times mentioned herein, a DDA employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, PIPPEN was acting within the scope of his employment as a DDA and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. PIPPEN is being named in his individual capacity for participation in the acts set forth below.

11. Plaintiff is informed and believes, and thereon alleges, that PAUL PFINGST (hereinafter "PFINGST") was at all times mentioned herein, the San Diego County

District Attorney and is and was an elected official, employed by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. At some times relevant hereto, PFINGST was acting within the scope of his employment as District Attorney and at other times he was working outside the scope of his employment, but at all times relevant hereto, he was acting under color of state law by virtue of his employment, agency and services. PFINGST is being named in his individual capacity for participation in the acts set forth below.

12. The names and/or capacities, whether individual, corporate, or otherwise of defendants, sued as DOES I through 100, are presently unknown to plaintiff, who identifies said defendants by such fictitious names. Plaintiff will seek leave of this Court to amend his complaint to show the true names and capacities when same become known.

13. At all times mentioned herein the individual defendants were acting as the agents or co-conspirators, of each other, and each and every one of the acts performed by them were performed within the course and scope of their agency or conspiracy and/or were authorized, approved, ratified and/or condoned by the remaining defendants.

INTRODUCTION

14. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE employed LONGANBACH as a prosecutor and provided him with the power to inflict irreparable harm upon the citizens of this community despite its knowledge that he violated numerous ethical and criminal laws, that he acted maliciously and in his own self-interest,

and that he was the antithesis of what an honest DDA was supposed to be.

15. In the spring of 1996, LONGANBACH and his investigative team, which included O'BRIEN, were assigned to the GENZLER case – a street fight that resulted in the death of Dustin "Dusty" Harless. This became a very high profile and well publicized case due, in part, to the fact that the victim, Dusty Harless, was a well known surfing personality in the area.

16. In order to gain a murder conviction, LONGANBACH and his investigative team, used their administrative and investigatory functions to, inter alia, influence investigations into the incident, alter investigative reports, hide evidence, destroy evidence, tamper with evidence and suborn perjury, threaten witnesses.

17. LONGANBACH was able to accomplish these acts because the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, and those individual defendants named herein, maintained an unwritten custom and practice of ignoring, condoning, and/or ratifying unethical conduct and behavior of its prosecutors.

18. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE also established and maintained policies and procedures for promoting and/or rewarding prosecutors who obtained convictions regardless of the unethical methods used in gaining the convictions or any wrongful conduct which violated the constitutional rights of the accused.

19. Plaintiff is informed and believes that DDAs are classified and promoted according to internal policies and

procedures established by the individually named defendants, PFINGST and THOMPSON. The classifications of DDA range from lowest and/or least experienced (Grade I) up through the highest ranking members within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE (Grade V).

20. At the time the misconduct alleged herein began, LONGANBACH was a Grade IV attorney. He was later promoted to Grade V. Before LONGANBACH and O'BRIEN were assigned to the GENZLER matter, they had acquired a reputation within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE for engaging in illegal acts and unethical conduct, including the planting of evidence in order to secure convictions. This reputation was known or reasonably should have been known to PFINGST, THOMPSON and PIPPIN, who nonetheless failed to discipline either LONGANBACH or O'BRIEN and continued to maintain LONGANBACH in his Grade IV position. Furthermore, they rewarded LONGANBACH for his past misconduct by assigning him to the high-profile GENZLER case. They then rewarded his misconduct in the GENZLER case by promoting him to Grade V and making him a division chief.

21. As a result of the misconduct and illegal acts of the defendants, GENZLER was inappropriately convicted of second degree murder and sentenced to 20 years to life in prison.

22. It was only after the conviction was reversed and remanded for new trial in 1999 that the misconduct in which LONGANBACH and his investigative team participated.

23. On remand, the case was assigned with a new DDA, Rebecca Blair, in March 1999.

24. In April 1999, Ms. Blair reported to THOMPSON and PIPPEN some of the misconduct she had discovered related to LONGANBACH and O'BRIEN in the GENZLER case. After Ms. Blair reported the misconduct, THOMPSON assumed control of the internal investigation into the misconduct.

25. In August 1999, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE was recused from the case and the retrial and investigation was placed in the hands of the State's Attorney General's office (hereinafter "AGO".)

26. During the internal investigation by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and while the investigation was being conducted by the AGO, defendants PFINGST, THOMPSON and PIPPEN used their administrative powers to protect LONGANBACH by trying to cover up the misconduct by improperly investigating the allegations, by denying the existence of exculpatory evidence, ignoring court orders not to destroy documents, continually delaying the release of materials known to exculpate GENZLER and/or demonstrate the depth and breadth of the misconduct, and by interfering with the investigation into the misconduct, all in an attempt to avoid accepting responsibility for what LONGANBACH and his investigative team had done in the investigation and prosecution of the case in 1996, and in an attempt to obtain another conviction of second degree murder.

27. Shortly after the case was taken over by the AGO, an investigation into other misconduct involving

LONGANBACH was initiated. A search warrant was eventually issued on the office of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE.

28. On or about August 25, 2000, GENZLER was exonerated of the second degree murder conviction when the jury returned a verdict of involuntary manslaughter.

29. GENZLER was sentenced on October 2, 2000.

30. GENZLER was released on February 14, 2001.

31. In February 2001, LONGANBACH was indicted by a grand jury for eight (8) counts of misappropriation of funds, four (4) counts of false accounting concerning public funds, one (1) count of embezzlement and grand theft.

FACTUAL ALLEGATIONS

A. Prior to the GENZLER Case, PFINGST, THOMPSON, and PIPPEN Initiated and Maintained Customs and Practices Which Encouraged LONGANBACH to Engage in Unethical and Dishonest Conduct.

32. In 1996, LONGANBACH was a DDA IV. He was supervised by PIPPEN.

33. PIPPEN was a DDA V. He reported directly to THOMPSON.

34. THOMPSON was the highest ranking non-elected member in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. Other than PFINGST, he was the highest ranking person in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. He reported directly to PFINGST.

35. Before assigning LONGANBACH to the GENZLER ease, PFINGST, THOMPSON, and PIPPEN knew LONGANBACH bullied, intimidated and tampered with witnesses and that he was known to use unethical tactics to color, shade and otherwise change percipient witnesses' testimony in order to bolster the cases on which he worked.

36. Despite this knowledge of LONGANBACH's tactics and misconduct, he was not only permitted to continue prosecuting cases but was rewarded for his efforts by being assigned high profile cases. His conduct was tolerated for several reasons, including a) that LONGANBACH's tactics resulted in the convictions which made the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, and therefore PFINGST, THOMPSON, and PIPPEN, look good in the public's eye; b) that LONGANBACH was friends with PFINGST, THOMPSON, and PIPPEN; and c) that LONGANBACH contributed to PFINGST's election campaign.

37. Despite these "benefits," PFINGST, THOMPSON, and PIPPEN knew LONGANBACH was creating image problems within the office and outside.

38. It was known in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE that LONGANBACH would do whatever he thought needed to be done to accomplish his goals, even if it meant breaking the law or the State Bar's rules of professional conduct. It was also well known among the criminal defense bar and increasingly among the judiciary.

39. Specifically, other DDAs who were assigned to offices near LONGANBACH's repeatedly heard LONGANBACH loudly attempting to steer, color, bully, intimidate and

otherwise change witnesses' testimony. Such conduct, being unethical, was raised through administrative channels with supervisors, including PFINGST, THOMPSON, and PIPPEN, as were concerns about LONGANBACH's ethics, or lack thereof. Nothing was done.

40. This conduct continued throughout 1996, the year in which LONGANBACH actually prosecuted GENZLER. PFINGST, THOMPSON, and PIPPEN knew that it was going on and failed to do anything knowing that the tactics were advancing their professional and/or political goals.

41. Prior to 1996, LONGANBACH was also known for instructing percipient witnesses not to talk to a defendant's counsel or their investigators. Among criminal defense attorneys, he was reputed to stop at nothing, illegal or unethical conduct included, in order to obtain a conviction.

42. PFINGST, THOMPSON, and PIPPEN's tolerance of LONGANBACH's conduct constitutes an unconstitutional administrative custom and practice in violation of section 1983.

43. In addition to the above, PFINGST, THOMPSON, and PIPPEN knew LONGANBACH was willing to hide evidence and alter investigative reports so as to remove evidence and/or information which benefitted a defendant. PFINGST, THOMPSON, and PIPPEN knew that other DDAs within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE who worked with and for LONGANBACH stated that they knew LONGANBACH "[p]ulled this shit. Everyone in this division knows he's dirty and does this shit . . . Everyone in the division knows it," yet they failed to take any action to prevent the

conduct knowing that their failure would result in the wrongful conviction of persons criminally accused, including GENZLER.

44. LONGANBACH's misconduct became so entrenched and wide spread that other DDAs in the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE complained to PFINGST, THOMPSON, and PIPPEN that LONGANBACH is "a cancer that needs to be cut out of the District Attorney's Office."

45. Much of the concern raised by other DDAs stemmed from disputes with LONGANBACH "over the ethics" of his conduct. For example, LONGANBACH was known to have requested that other DDAs prepare false paper work.

46. Some of the disputes between LONGANBACH and other DDAs were raised with top members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, and to LONGANBACH's superiors. Nothing was done.

47. LONGANBACH's unethical conduct even resulted in DA investigators refusing to work with him. In one instance, an investigator complained to a supervisor that LONGANBACH illegally instructed the investigator and police officers to return evidence in a homicide case to its original location so that a search warrant could then be obtained, thereby making the evidence admissible in court. LONGANBACH's illegal request was reported to supervisory personnel at the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. Nothing was done.

48. LONGANBACH's reputation for unethical conduct in investigations and prosecutions was also known by members of the judiciary.

49. A sitting judge of the San Diego County Superior Court complained about LONGANBACH's poor reputation in the legal community for honesty and ethics. Several Superior Court judges and others in the justice system expressed their concern that LONGANBACH was "a black eye on the concept of what prosecution is all about." He was widely reputed to play games with discovery, play "hide the ball," and bully attorneys and even judges.

50. In the face of all the knowledge of misconduct and illegal behavior by the prosecutor, PFINGST, THOMPSON, and PIPPEN repeatedly failed and refused to act and/or take any corrective or administrative action against LONGANBACH and other DDAs who engaged in similar misconduct. Such a decision constitutes the creation of a custom and practice of permitting individual prosecutors to abuse their positions and power in order to violate the constitutional rights of community members accused of a crime.

B. <u>The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE Knew LONGANBACH Was Committing Prosecutorial Misconduct in the Investigation and Prosecution of GENZLER.</u>

51. LONGANBACH made two important promises to PFINGST, THOMPSON, and PIPPEN in the course of his assignment to prosecute GENZLER in 1996: first, that he could successfully recuse defense counsel from the case and that the recusal would be upheld on appeal; and second, that he would obtain a murder conviction. LONGANBACH, PFINGST, THOMPSON, and PIPPEN knew that in order for LONGANBACH to keep these promises, he would inevitably violate ethical rules, criminal statutes

and trample on the constitutional rights of GENZLER. They were right.

52. During the initial investigation of the GENZLER case, it became apparent that the incident giving rise to the criminal charges against GENZLER resulted from a chance meeting that escalated into a street fight wherein Dusty Harless was unfortunately killed.

53. LONGANBACH received a copy of the initial investigative report by O'BRIEN.

54. LONGANBACH knew that GENZLER would claim self-defense in the criminal case.

55. The initial report indicated that, *inter alia*, key witness Sky Flanders (Mr. Harless' girlfriend) was aware of and had seen Mr. Harless in multiple street fights and brawls. LONGANBACH knew that such information would support GENZLER's claim of self-defense.

56. LONGANBACH ordered O'BRIEN to destroy the report and redraft it deleting any reference to Mr. Harless' prior physical conflicts or any other potentially exculpatory evidence/information.

57. O'BRIEN destroyed the original report and rewrote it without reference to Mr. Harless' prior street fights or Ms. Flanders' knowledge of Mr. Harless being involved in brawls.

58. In order for the revised report to go undetected, LONGANBACH and O'BRIEN conspired to hide evidence and hide the truth by tampering with witnesses and suborning perjury. They used their investigatory and administrative functions and used the administrative

powers of the SAN DIEGO DISTRICT ATTORNEY'S OFFICE to execute a plan to keep exculpatory information, evidence and documents, to which GENZLER's attorneys were entitled, from GENZLER's attorneys. They refused to provide and otherwise delayed providing information to which GENZLER's attorneys were entitled. This gave them time to tamper with witnesses and change their testimony before the preliminary hearing which took place on or about May 23, 1996.

59. In addition to altering the report, while initially investigating the case, they coerced and bullied witnesses into changing their testimony related to what occurred on the night of the incident. Such acts were done during the investigatory phase of the case and while LONGANBACH was acting in an investigatory role.

60. The two lead witnesses for the prosecution were Scott Davis and Sky Flanders, the victim's girlfriend. Both spoke with police at the scene and gave immediate, first hand accounts of what they saw and experienced. Both also participated in taped interviews with police on or about April 18, 1996, more than one month before the preliminary hearing.

61. Transcripts of both interviews, as well as numerous other witness statements which were in the possession of LONGANBACH and O'BRIEN, were kept from GENZLER's counsel until after the preliminary hearing.

62. The timing and manner in which discovery is collected, organized and produced to a criminal defendant's counsel is an investigatory and/or administrative function/act. Thus, LONGANBACH used his administrative and investigatory powers to ensure that GENZLER's attorneys did not have the benefit of the statements when

the witnesses testified, and therefore could not cross-examine the witnesses on the contradictions between their testimony and what was contained in the previously recorded statements.

63. Still further, when the tapes were eventually disclosed, the tape related to Scott Davis had been tampered with.

64. Specifically, Scott Davis gave a recorded statement to homicide detective Jackson. Detective Jackson recorded the entire statement and turned the tapes over to the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. When GENZLER's attorneys sought a copy of Scott Davis' critical initial statement, side "A" of the tape mysteriously came up blank. LONGANBACH and/or O'BRIEN were in possession of the tape since shortly after it was created – and now the first half of it was missing.

65. Sky Flanders also gave a taped statement to police investigators on or about April 18, 1996. During that interview, Ms. Flanders describes the "fight" much differently than she did at later dates. In fact, Ms. Flanders admits on tape (the first time she discussed the incident) that Dusty Harless was "on top" of GENZLER during the altercation; a fact which supported GENZLER's claim of self defense and a fact which was deleted from O'BRIEN's report.

66. LONGANBACH and O'BRIEN knew that information from Ms. Flanders which supported GENZLER's self-defense claim had been deleted from the investigative report and that GENZLER's attorneys had thus far been deprived of the taped interviews. They then suborned perjury. Specifically, prior to the preliminary hearing and

during the initial investigation of the incident, LONGANBACH and O'BRIEN met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past.

67. After meeting with LONGANBACH and O'BRIEN, Ms. Flanders changed her testimony related to what she saw during the altercation. Since GENZLER's attorneys did not have access to the taped statement and therefore were without benefit of its contents, they were unable to cross-examine Ms. Flanders on her changed testimony or the reasons for the change.

68. Ms. Flanders had now perjured herself and was therefore committed to LONGANBACH's plan to obtain a murder conviction in the case regardless of the methods or means by which the conviction was obtained.

69. As indicated above, Sky Flanders was also told to testify falsely about having actually seen Mr. Harless in prior street or bar fights and about her knowledge of his being in other fights/brawls.

70. LONGANBACH and O'BRIEN knew that Ms. Flanders' testimony as to her knowledge of past aggressive conduct by Dusty Harless would be critical to gaining the conviction that they sought. During the investigation, they conveyed this in no uncertain terms to Ms. Flanders. They then put her on the stand, repeatedly, and allowed her to perjure herself. Her testimony was case determinative. It was also thoroughly dishonest.

71. Prior to the preliminary hearing in the case, it became apparent to GENZLER's attorneys that key discovery items which were in the possession of the prosecution's

investigatory team were missing from the materials provided to them. These materials were crucial to GENZLER's defense. Taken together, there was a massive amount of documents, evidence and material which had been hidden. GENZLER's attorney, Gerald Blank, prepared and presented a motion for a continuance of the preliminary hearing. The motion was heard on May 21, 1996, before the Honorable Adrienne Orfield, Judge Presiding. At the hearing, LONGANBACH stated that he was not aware of the existence of, *inter alia*, the percipient witnesses' taped statements, some of which were more than one month old at the time and which the prosecution had been using during their investigation. The materials were then sporadically and grudgingly provided to GENZLER's attorneys. The materials were provided either on the eve of the preliminary hearing or after it had taken place. The timing of the disclosures prevented GENZLER's attorneys from utilizing the materials at the preliminary hearing.

72. Although the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and law enforcement officials had possession of and access to this information well before the preliminary examination, and used these materials during their investigations, they used their investigative and administrative functions and powers to hide, secrete and otherwise prevent GENZLER's attorneys from getting access to the materials or using them in the criminal defense investigation and/or defense of the case.

73. The above conduct, in essence, prevented GENZLER's attorneys from properly examining witnesses during the preliminary hearing or preparing the case as quickly and fully as it should have been. Thus, the prosecution used its investigatory and administrative powers to

deprive GENZLER of his constitutional rights to a fair trial as set forth herein.

74. LONGANBACH and O'BRIEN's misconduct did not stop there. On August 22, 1996, at an evidentiary hearing held before the Honorable Joan P. Weber, LONGANBACH granted prosecution witness, Sheri Logel, immunity in exchange for testimony favorable to the prosecution. This grant of immunity included immunity from perjury and *not just, from past acts of perjury, but was intended to cover future acts of lying on the stand at the trial of plaintiff.* In essence, LONGANBACH gave Ms. Logel a "get out of jail free card" for lying on the stand. This was done with the knowledge of PFINGST, THOMPSON, and PIPPEN.

75. Ms. Logel then went on to perjure herself at LONGANBACH's specific direction. She testified that she had given to Mr. Blank the knife which allegedly had been used in the altercation wherein Mr. Harless was killed. She further testified for LONGANBACH that Mr. Blank then wiped the knife clean and instructed her to return it to the car from where it was initially taken by her.

76. Mr. Blank later raised the grant of immunity with the trial judge, Judge Kennedy, who promptly disallowed and/or revoked the grant of immunity as to perjury, in his court.

77. Later, having her perjury immunity removed, Ms. Logel admitted that she had lied under oath about her dealings with Gerald Blank, including her testimony related to delivering evidence, including that knife, to Gerald Blank's office.

78. Ms. Logel lied because she was threatened by LONGANBACH. Specifically, she stated that after she found the knife in her trunk she told LONGANBACH. LONGANBACH responded by threatening that if she didn't testify that Mr. Blank gave her the knife and instructed her on what to do with it, he would send her to jail and take away her children.

79. The false testimony, caused by a combination of threats and a grant of immunity, was committed as part of an investigatory aspect in the case. It violated GENZLER's constitutional rights to a fair trial and interfered with GENZLER's relationship with his chosen retained counsel. In fact, the relationship was completely severed. While Ms. Logel did not testify at trial, her lies were the key to a ruling by Judge Kennedy which recused Mr. Blank from the case. Without her false testimony there would have been no basis for the ruling to recuse GENZLER's counsel.

80. LONGANBACH used Ms. Logel's lies when he represented to Judge Kennedy that he intended on calling both Ms. Logel and Mr. Blank as witnesses in the case. In fact, LONGANBACH bluntly assured Judge Kennedy that he would call both as trial witnesses. Judge Kennedy told LONGANBACH he did not want to be "sandbagged" on the issue; however, based on Ms. Logel's perjured testimony and LONGANBACH's representations, Judge Kennedy recused Mr. Blank and thereby removed GENZLER's attorney of choice.

81. Neither Mr. Blank nor Ms. Logel were called as trial witnesses by LONGANBACH. It The entire presentation of false evidence and perjured testimony was nothing but an attempt to remove GENZLER's attorney from the case so as to improperly influence the outcome of the case

which LONGANBACH had promised PFINGST, THOMPSON, and PIPPEN he would win.

82. LONGANBACH was excited by the recusal ploy he used. It became one of his favorite tactics. He tried the same tactic in other cases and on other attorneys. PFINGST, THOMPSON, and PIPPEN were aware of what he was doing and how he was doing it, but continued to condone and ratify his conduct, because it worked.

83. Prior to LONGANBACH's motion to recuse Mr. Blank, and as part of the investigation of the incident, Sky Flanders informed O'BRIEN and LONGANBACH of at least two instances where she witnessed Dusty Harless in "street fights" and told LONGANBACH of at least one other incident wherein she heard that Mr. Harless "launched" several males who had surrounded him in a physical altercation at a bar. Not only did the evidence support the conclusion that this critical defense evidence was removed from O'BRIEN's first version of the report, at LONGANBACH's direction, but Ms. Flanders was told not to mention these fights on the witness stand. Ms. Flanders was also told that any mention of these fights would diminish the likelihood of a conviction. Accordingly, she testified in the 1996 trial that she had never witnessed Dusty Harless in any "street fights."

84. Ms. Flanders provided vivid detail of the incident at Cable and Voltaire to Officers McElfresh and Duran at the scene, and then again to friends and family members within hours after the incident. She was clear as to what she saw. Those facts supported GENZLER's claim of self-defense. However, following her initial meetings with LONGANBACH and O'BRIEN during their investigation, she was suddenly "secure" in her belief that she had not

seen the incident or any of the events which supported GENZLER'S claim of self-defense. Sky Flanders later admitted that she had testified falsely as a result of her meetings with LONGANBACH and O'BRIEN, and further that she did not want to lie on the stand again.

85. Ms. Flanders stated that she knew when she left the first meeting with LONGANBACH and O'BRIEN that it would be better for the case if she didn't see the details or testify to them.

86. LONGANBACH also used his investigative and administrative powers to hide other evidence. A four (4) page San Diego Police Department ("SDPD") Crime/ Incident Report in SDPD Case Number 93-063750, relating to an alleged incident between GENZLER (and others) and John M. Belsan, a prosecution witness in GENZLER's 1996 trial, was also hidden by LONGANBACH and/or his investigators at the direction of LONGANBACH. The incident allegedly occurred on July 18, 1993, when Mr. Belsan was working as a bouncer at a Pacific Beach bar named "Mick's" and where GENZLER and others were patrons. An altercation occurred. GENZLER was neither arrested by the SDPD nor prosecuted with respect to this incident.

87. During the 1996 proceedings, LONGANBACH had Mr. Belsan testify that this incident was a prior violent act committed by GENZLER. However, the aforementioned police report was never disclosed to the defense in connection with GENZLER's 1996 trial proceedings.

88. Still further, later in the trial, the defense tried to subpoena the police report from the SDPD. In response, the defense received a Certification of No Records. As such, LONGANBACH and O'BRIEN used their positions

to remove the only available copies of the report related to the "Belsan" incident and thereby further prejudice GENZLER and prevent him from obtaining a fair trial.

89. LONGANBACH also used the "Belsan" incident to add another spring board to his closing argument. Mr. Belsan testified he was "hit across the shoulders with something, a pipe, stick, board." When he turned around, he said he was facing the GENZLER brothers. The SDPD Crime/Incident Report patently controverted this allegation in that it indicated that the only weapon listed there is "hands and feet." Nevertheless, LONGANBACH argued in his closing argument that Belsan's testimony was proof that GENZLER was the "master of the sneak attack . . . I think we also see a pattern. The defendant is the master of the surprise attack, the sneak attack. That's what he did with John Belsan."

90. To compound this array of misconduct both in and out of the courtroom, LONGANBACH then argued to the jury the relevance and importance of the "Belsan" incident by referring to it as evidence of "other crimes," by GENZLER which "you [the jury] can use this evidence of other crimes in evaluating the credibility of self-defense."

91. In addition, LONGANBACH argued how GENZLER kicked Mr. Belsan in the face. He made this allegation knowing that his investigation tactics had discovered the medical records of Mr. Belsan that contained no indication that such a kick ever occurred. These records could have been used to impeach Mr. Belsan's credibility. Specifically, on December 2, 1996, Nancy Cervi, Mission Bay Hospital custodian of records, appeared in court in response to a defense subpoena. She stated she did not have the medical records related to Mr. Belsan's treatment

from the night at issue but had already turned them over to O'BRIEN. She had given them to O'BRIEN on August, 26, 1996, almost three (3) months prior to the trial date whereupon LONGANBACH called Mr. Belsan to the stand. Those records were withheld from GENZLER's counsel during the trial.

92. Years later, when it eventually was turned over, the police report showed that not only did Mr. Belsan's testimony on the description of the incident and his injuries vary from those he gave the police the night of this incident and those which were contained in the police report, but even his physical description of GENZLER was different. Because the report was hidden, GENZLER's attorneys were not only unable to impeach Mr. Belsan with his prior inconsistent statements, but they were also unable to ascertain the identities of the responding officers or call them to the stand to impeach Mr. Belsan. Thus, the only evidence available to impeach Mr. Belsan's testimony, was that of GENZLER.

93. In short, LONGANBACH used his investigatory and administrative powers to frustrate and corrupt GENZLER's right to a fair trial, then used his position as trial attorney to capitalize on those illegal acts thus furthering the violations to GENZLER's constitutional rights.

94. LONGANBACH also attempted to influence other investigators to perjure themselves at the 1996 trial and alter reports related to the underlying incident with Mr. Harless. Specifically, LONGANBACH was aware of an issue related to blood stains on a shirt allegedly worn by GENZLER on the night of the incident. The DNA evidence was degraded. The cause of the degradation was apparently exposure to moisture. LONGANBACH wanted to

argue that GENZLER washed the shirt himself, thus demonstrating his intent to cover up a crime. Accordingly, LONGANBACH contacted Sargent Martin, the officer who investigated the scene and who wrote the description of the area and weather conditions on the evening of the incident. LONGANBACH told him: "Just remember, rain is bad." The reason that "rain is bad" is because it would explain why the shirt was exposed to moisture.

95. Not surprisingly, LONGANBACH obtained the conviction he was after. On February 10, 1997, GENZLER was sentenced for second degree murder. He was given 20 years to life. He was 26 years old and faced spending the rest of his life in prison.

96. After securing GENZLER's conviction, LONGANBACH was promoted to the position of Chief of the Fraud Division for the District Attorney's Office. This promotion constitutes PFINGST, THOMPSON, and PIPPEN's "official" ratification of LONGANBACH's unethical and illegal conduct. In essence, they promoted him for violating GENZLER's constitutional rights and getting away with it.

97. While in his elevated position, LONGANBACH was frequently observed engaging in conduct which was unethical and illegal which included overt attempts to further violate the rights of persons whom he was prosecuting. However, none of this conduct ran afoul of the administrative goals of PFINGST, THOMPSON, and PIPPEN as long as he was getting the convictions. In fact, it was only after allegations that LONGANBACH illegally used of county personnel and equipment to work on his personal affairs and financial matters that anyone became critical of his behavior. In essence, it was acceptable that

LONGANBACH was violating the constitutional rights of citizens but unacceptable if he stealing time or resources from the County.

98. The lengths to which LONGANBACH would go to gain an unfair and unethical advantage were well known prior to and during the retrial phase. As a specific example, LONGANBACH, and those under his direction, would engage in investigatory and administrative misconduct such as hiding approximately 100 pages of discovery relevant to a case being tried, among 18,000 pages of discovery in the case. The defense had requested all documents. LONGANBACH directed those under his supervision to devise a plan to make discovery extremely difficult for the defense attorneys to manage or find the relevant material. They did so by collating the 100 pages of relevant discovery into the 18,000 thousand pages of other documents with the specific purpose of making the relevant discovery hard, if even possible, to find.

99. By way of further example, at LONGANBACH's direction, his investigators and/or administrative staff altered evidence by changing numbers on documents and intentionally made light copies of discovery on the office copier so that they could not be read.

100. O'BRIEN was seen and known to have done the same things.

101. Still further, LONGANBACH was known to have obtained confidential information related to criminal defenses and not only failed to return the documents, but altered his prosecution strategy so as to make use of the information which he illegally maintained.

102. PFINGST, THOMPSON, and PIPPEN were aware of these incidents and failed to do anything about them. Rather, they allowed LONGANBACH to continue engaging in such tactics.

103. Because of the administrative policies permitting, condoning and fostering the above referenced conduct, LONGANBACH and O'BRIEN were free to and did conspire and acted so as to change the investigative report related to Sky Flanders, manufacture evidence and suborned perjury. They deleted references to statements that described Harless as a fighter who had been in multiple street fights. Later, PFINGST, THOMPSON, and PIPPEN became aware that the information was removed from the reports provided to GENZLER's attorneys and that LONGANBACH and O'BRIEN had coerced Sky Flanders into perjuring herself, PFINGST, THOMPSON, and PIPPEN either failed to act or acted inappropriately, thereby condoning and furthering the misconduct. Specifically, even after the wrongful conduct of LONGANBACH and O'BRIEN were known, PFINGST, THOMPSON, and PIPPEN continued to make excuses for the acts and hide the truth.

C. PFINGST, THOMPSON, AND PIPPEN Tried to Protect LONGANBACH and Cover up the Misconduct.

104. LONGANBACH's unethical conduct and obvious willingness to do anything to win was noted by professionals outside the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE. These complaints were received before GENZLER's case was remanded on appeal. Therefore, before the specific allegations of misconduct were made in the instant matter, PFINGST, THOMPSON, and

PIPPEN knew of LONGANBACH's inappropriate behavior and willingness to lie, cheat and engage in illegal behavior.

105. In a letter to PFINGST dated November 30, 1998, economist Arthur Brodshatzer wrote about his recent experience dealing with LONGANBACH in an unrelated case on which LONGANBACH had asked him to consult: " . . . frankly I was appalled at his [LONGANBACH's] total dishonesty . . . but he just made me want to retch. I think you should do something about this man. He is a danger to your office and to the likelihood of someone getting a fair trial. Obviously, he can lie with ease."

106. Nothing was done by PFINGST, THOMPSON, or PIPPEN.

107. In the early spring of 1999, the GENZLER case was remanded for retrial and assigned to DDA Rebecca Blair for prosecution. As she began working on the case, she discovered facts which clearly violated her code of ethics and those purportedly formally espoused and adopted by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE.

108. In April 1999, when LONGANBACH's misconduct was initially discovered by DDA Blair during her conversation with O'BRIEN, she had a meeting with top level members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE including THOMPSON, and PIPPEN. During the meeting, she was not only discouraged from immediately presenting the information to GENZLER's defense attorneys, but was actively prevented from doing so. Still further, she was discouraged from pursuing her inquiry into any prosecutorial misconduct.

109. In addition, after PFINGST, THOMPSON, and PIPPEN learned that there was no way that they could keep the misconduct secret, they attempted to not only minimize the events, but took steps to protect LONGANBACH from internal investigations that would readily and easily prove that he had corrupted the investigation, mishandled the case, and engaged in illegal conduct in the preparation of the case both in its investigative and trial phases. Specifically, *before* reluctantly initiating internal investigation into LONGANBACH's misconduct, PIPPEN, at the direction of THOMPSON called LONGANBACH at home and warned him that they were being forced to initiate an investigation and thereby gave him an opportunity to destroy evidence, documents and materials related to what he had done.

110. THOMPSON then assigned an investigator to conduct inquiries into the misconduct of LONGANBACH and O'BRIEN. THOMPSON instructed the investigator not to any notes during any of his interviews, THOMPSON also admonished the investigator that "this was an investigation in name only." In essence, PFINGST, THOMPSON, and PIPPEN used their administrative powers to intentionally thwart the efforts and effectiveness of an investigation into investigatory, administrative and prosecutorial misconduct by advising the target of the investigation that he needed to be prepared. PFINGST, THOMPSON, and PIPPEN intentionally gave LONGANBACH the opportunity to get ready and prepared to be investigated. Such conduct constitutes ratification of the underlying acts, a conspiracy to cover up the violations to GENZLER's constitutional rights and a conspiracy to again attempt to deprive GENZLER of his constitutional rights to a fair trial by hiding exculpatory evidence.

111. After the Court of Appeals remanded the case for new trial, LONGANBACH, using a pretext of trying to help DDA Blair, tried to exert pressure on DDA Blair and control the case from the outside. He had meetings with her wherein he tried to steer the case and tell her how she needed to handle the prosecution. These efforts and contacts were nothing more than an attempt to cover up his wrongful conduct in the 1996 investigation and trial.

112. DDA Blair told LONGANBACH that she did not want him involved at all.

113. PFINGST, THOMPSON, and PIPPEN knew LONGANBACH was engaged in this conduct. They did nothing to stop it, rather they also pressured DDA Blair to not pursue LONGANBACH's misconduct as aggressively as she intended.

114. PFINGST, THOMPSON, and PIPPEN also used their administrative powers to withhold evidence from GENZLER's attorneys. As set forth above, as part of the case's initial investigation, LONGANBACH and O'BRIEN changed and hid reports, including that which was related to Mr. Belsan's felony arrest. Although the reports were requested, LONGANBACH never produced them. Later, after the case's remand, GENZLER's attorneys again requested that the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE produce the reports. In fact, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE was ordered by the court to produce them. However, they failed to do so. The reports and evidence were in the possession of the defendants, however they used their administrative roles and/or functions to delay, subvert and frustrate the discovery process. The reports were not provided to GENZLER's attorneys until October 15, 1999,

after the AGO's took over the case. The cover memorandum makes it clear that the report was in the possession of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and turned over to the AGO after the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE finally recused itself from the retrial.

115. PFINGST, THOMPSON, and PIPPEN decided that they would handle the investigation into LONGANBACH's misconduct and, on an administrative level, handle the production of information to the defense. PFINGST, THOMPSON, and PIPPEN, in their individual capacities within the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE had materials which were exculpatory. The court ordered that these materials be produced. The SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE failed to produce the evidence related to the misconduct despite the fact that they were initially the agency conducting the investigation. These acts and omissions constitute participation by PFINGST, THOMPSON, and PIPPEN in a cover up of the wrongful acts of LONGANBACH and O'BRIEN. In fact, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE's failure to wholly and promptly comply with all requests and discovery orders in the second trial was nothing more than an attempt to reconvict GENZLER of second degree murder so that the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE could later take the position that there were no adverse consequences to LONGANBACH's and O'BRIEN's misconduct.

116. On June 22, 1999, a hearing was held before Superior Court Judge Shore. The Court ordered, *inter alia,* that the SAN DIEGO COUNTY DISTRICT ATTORNEY'S

OFFICE was to not destroy any additional records related to the prosecution of plaintiff.

117. Over the following weeks and months, the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, led by PFINGST, THOMPSON, and PIPPEN, ignored the Court's order and continued destroying notes, reports and other documentary evidence sought by defense counsel.

118. During the investigation by the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE and then the investigation by the AGO of the allegations of misconduct related to the GENZLER case, PFINGST, THOMPSON, and PIPPEN, were aware that O'BRIEN was lying about what he did and did not do related to deleting material from reports and helping LONGANBACH get witnesses to change their testimony.

119. PFINGST, THOMPSON, and PIPPEN, also knew that, *inter alia,* O'BRIEN, at the prompting of LONGANBACH, intentionally deleted from his report information which PFINGST, THOMPSON, and PIPPEN, knew that investigators, and O'BRIEN specifically, routinely included in reports. Knowing that the information had been removed, PFINGST, THOMPSON, and PIPPEN, continued to protect O'BRIEN and LONGANBACH by not providing GENZLER's attorneys access to the requested information.

120. PFINGST, THOMPSON, and PIPPEN, also permitted O'BRIEN's report related to his initial interview with Sky Flanders to disappear and/or be deleted.

121. After it became known to PFINGST, THOMPSON, and PIPPEN, that DDA Blair was preparing evidence and participating in an investigation related to

prosecutorial misconduct and later that she would be testifying honestly about the prosecutorial misconduct that her office had engaged in, she was ostracized by PFINGST, THOMPSON, and PIPPEN, and pressured to change her testimony about what she was told by O'BRIEN about the suborning of perjury. Still further, at the direction of PFINGST, THOMPSON, and PIPPEN, she was portrayed in open court as being incompetent, histrionic and inexperienced. She was eventually transferred to a position which was considered to be a demotion.

122. DDA Blair was not the only DDA who went to senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE with knowledge of LONGANBACH's misconduct and unethical behavior. Like Blair, they too suffered retaliation.

123. In August 1999, once it was finally decided that the matter was to be turned over to the AGO, LONGANBACH was told by senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE of the imminent change. LONGANBACH was seen shortly thereafter, early in the morning well before he usually entered the office and before anyone else usually got to the office, going through files and gathering materials from his office.

124. At hearings related to the retrial, including dismissal hearings and evidentiary hearings, senior members of the SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE were seen holding closed door meetings with LONGANBACH and O'BRIEN and were also heard telling LONGANBACH that he had "to keep it together."

125. All of the above acts were administrative functions which were being used by defendants, and each of them, in an attempt to violate GENZLER's constitutional rights – the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.

126. LONGANBACH, and the other defendants conspired, acted in concert, and aided and abetted each other to do whatever was necessary, lawful or not, to cause GENZLER's conviction for second-degree murder, not only during the original prosecution in 1996, but also during his retrial in 2000, even though they had been relieved of any prosecutorial function in that case and even though their conduct frustrated an investigation by the AGO.

127. The individual defendants pressured, coerced, extorted and/or otherwise improperly caused witnesses to give untruthful, erroneous, incomplete and/or misleading statements and testimony related to the underlying case, as well as the investigation into LONGANBACH's misdeeds.

128. The aforementioned conduct establishes violations of GENZLER's constitutional right to the timely disclosure of exculpatory evidence, and of his constitutional right not be prosecuted, or convicted or sentenced upon the testimony of witnesses who have been illegally bribed, coerced or influenced in their testimony, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, and the right to a fair trial under the Fifth, Sixth and Fourteenth Amendments.

FIRST CAUSE OF ACTION

(Conspiracy to Commit Violation of the Civil Rights 42 U.S.C. 1983 – Against All Defendants)

129. Plaintiff realleges those allegations contained in the above paragraphs and incorporates them into this cause of action as the set forth fully herein.

130. Defendants, and each of them, as alleged above, entered into a conspiracy to violate the civil and constitutional rights of plaintiff, including violations of the first, fourth, fifth, eighth, thirteenth and fourteenth amendments.

131. As alleged in the foregoing paragraphs, the defendants, and each of them, both individually and by and through their agents and employees, acting under color of the State Law and/or statutes, ordinances, regulations, custom and usage, subjected, and/or caused to be subjected, plaintiff to violations of those rights, privileges and immunities secured by the Constitution and the laws of the United States and of the state of California.

132. As a direct and proximate result of the tortious acts of defendants, and each of them, plaintiff has suffered actual special and general damages, the nature and amount of which will be shown according to proof at the time of trial.

133. The defendants, and each of them, engaged in conduct and committed the acts complained of herein with the intent to harm the plaintiff. Said acts were done maliciously and oppressively. Plaintiff is therefore entitled to exemplary and punitive damages to be shown according to proof at the time of trial.

SECOND CAUSE OF ACTION

(Violation of Civil Rights 42 U.S.C. Section 1983 – Against All Defendants)

134. Plaintiff realleges those allegations contained in the above paragraphs and incorporates them into this cause of action as the set forth fully herein.

135. As alleged in the foregoing paragraphs, the defendants, and each of them, both individually and by and through their agents and employees, acting under color of statute, ordinance, regulations, custom and practices, subjected and/or caused to be subjected, plaintiff to violations of his civil rights, privileges and immunities, which are secured by the Constitution and laws of the United States and the of the State of California including violations of the first, fourth, fifth, eighth, thirteenth and fourteenth amendments.

136. As a direct and proximate result of the tortious acts of defendants, and each of them, plaintiff has suffered special and general damages, the exact nature and amount of which will be shown according to proof at the time trial.

137. The defendants, and each of them, engaging in conduct in committing the acts complained of herein which were malicious and oppressive and done with the intent to harm plaintiff. Plaintiff is therefore entitled to exemplary and punitive damages which will be shown according to proof that the time of trial.

THIRD CAUSE OF ACTION

(Negligent Hiring, Retention and Promotion – Against PFINGST, THOMPSON, and PIPPEN)

138. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

139. LONGANBACH lied on his civil service application and fraudulently repeatedly misrepresented the institution from which he obtained his law degree, on his resume, on internal administrative documents and to the public at large.

140. Due to the level of responsibilities to be vested in prosecutors, the individually named defendants have a duty to investigate and confirm the background and qualifications of those persons whom they hire, retain and promote.

141. Had the individually named defendants met their duties, LONGANBACH's willingness to misrepresent himself and his credentials would have been discovered. As such, they would have been on notice of his willingness to lie to further his professional goals.

142. PFINGST, THOMPSON, and PIPPEN had a duty to plaintiff to act with ordinary care and prudence in their administrative functions so as not to cause harm or injury to another.

143. By engaging in the acts and omissions alleged herein, the defendants not only failed to act with ordinary care, they acted with reckless disregard of the constitutional rights of plaintiff and others similarly situated.

144. As a direct, proximate and foreseeable result of the defendants breach of their duty of care, plaintiff suffered damages in an amount according to proof at the time of trial.

FOURTH CAUSE OF ACTION

(Negligent Supervision – Against PFINGST, THOMPSON and PIPPEN)

146. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

147. PFINGST, THOMPSON, and PIPPEN had a duty to plaintiff to act with ordinary care and prudence in their administrative functions and in their supervision of employees of the SAN DIEGO DISTRICT ATTORNEY'S OFFICE so as not to cause harm or injury to another.

148. By engaging in the acts and omissions alleged herein, the defendants not only failed to act with ordinary care, they acted with reckless disregard for the constitutional rights of the plaintiff and others similarly situated.

149. As a direct, proximate and foreseeable result of the defendants breach of their duty of care, plaintiff suffered damages in an amount according to proof at the time of trial.

FIFTH CAUSE OF ACTION

(Aiding and Abetting – Against LONGANBACH and O'BRIEN)

150. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

151. By engaging in the acts and omissions set forth above, LONGANBACH and O'BRIEN knew that their conduct was going to and did cause a violation of GENZLER's constitutional rights as more fully set forth above.

152. By engaging in the acts and omissions set forth above LONGANBACH and O'BRIEN knew that their conduct was going to cause and/or threatened to cause additional and/or future violations of GENZLER's constitutional rights as more fully set forth above.

153. By engaging in the acts and omissions set forth above, LONGANBACH and O'BRIEN gave substantial assistance to each other in an effort to violate GENZLER's constitutional rights, by covering up the violations of his constitutional rights and in conspiring to subject GENZLER to future and/or continued violations.

154. By engaging in the acts and omissions set forth above, LONGANBACH and O'BRIEN aided and abetted each other in the perpetration of their illegal, improper and inappropriate conduct set forth herein, including, but not limited to the acts which gave rise to this complaint.

155. As a direct and proximate cause thereof, plaintiff has been and continues to be injured and suffered damages as set forth above in amounts to be proven at trial.

SIXTH CAUSE OF ACTION

(Aiding and Abetting – Against PFINGST, THOMPSON, and PIPPEN)

156. Plaintiff realleges and incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein.

157. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN knew that LONGANBACH's conduct was going to and did cause a violation of GENZLER's constitutional rights as more fully set forth above.

158. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN knew that their conduct, coupled with that of LONGANBACH, was going to cause and/or threatened to cause additional and/or future violations of GENZLER's constitutional rights as more fully set forth above.

159. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN gave substantial assistance to LONGANBACH and to each other in an effort to violate GENZLER's constitutional rights, by covering up the violations of his constitutional rights and in conspiring to subject GENZLER to future and/or continued violations.

160. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN aided and abetted LONGANBACH in the perpetration of his illegal, improper and inappropriate conduct set forth herein, including, but not limited to the acts which gave rise to this complaint.

161. By engaging in the acts and omissions set forth above, PFINGST, THOMPSON, and PIPPEN aided and abetted each other in the perpetration of their illegal, improper and inappropriate conduct set forth herein, including, but not limited to the acts which gave rise to this complaint.

162. As a direct and proximate cause thereof, plaintiff has been and continues to be injured and suffered damages as set forth above in amounts to be proven at trial.

SEVENTH CAUSE OF ACTION

(Civil Rights Violation B CC § 52.1 – Against All Individually Named Defendants)

163. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

164. Any person, whether or not acting under color of state law, interferes by threats, intimidation or coercion, with the exercise or enjoyment by any individual with rights secured by the Constitution or laws of the State of California, violates section 52.1 of the Unruh Civil Rights Act.

165. All defendants violated plaintiff's rights under section 52.1 by interfering with investigations, changing investigatory reports, committing perjury, suborning perjury, fabricating evidence and suppressing evidence in an effort to violate plaintiff's rights of to due process and a fair trial. The defendants succeeded in violating plaintiff's due process rights and right to a fair trial by engaging in the conduct alleged above.

166. Due to the violation of plaintiff's rights by all defendants, plaintiff has suffered economic damages and non-economic damages, including, but not limited to, attorney fees, emotional distress, pain and suffering, fear and humiliation caused by the acts complained of herein according to proof at the time of trial.

167. Plaintiff's also entitled to the statutory civil penalties, exemplary damages and attorneys' fees and costs of suit incurred herein.

EIGHTH CAUSE OF ACTION

Conspiracy to Violate Civil Rights B CC § 52.1 (Against All Individually Named Defendants)

168. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

169. The defendants, and each of them, entered into a conspiracy to violate the civil and constitutional rights of plaintiff, including their right to due process and their right to a fair trial.

170. Any person, whether or not acting under color of state law, interferes by threats, intimidation or coercion, with the exercise or enjoyment by any individual with rights secured by the Constitution or laws of the State of California, violates section 52.1 of the Unruh Civil Rights Act. All defendants violated plaintiff's rights under section 52.1 by tampering with investigations, altering investigative reports, committing perjury, suborning perjury, fabricating evidence and suppressing evidence in an effort to violate plaintiff's rights to due process and a fair trial. The defendants succeeded in violating plaintiff's due

process rights and right to a fair trial by engaging in the conduct alleged above.

171. Due to the violation of plaintiff's rights by all defendants, plaintiff has suffered economic damages and non-economic damages, including, but not limited to, attorney fees, lost wages, emotional distress, pain and suffering, fear and humiliation caused by the acts complained of herein according to proof at the time of trial.

172. Plaintiff is also entitled to the statutory civil penalties, exemplary damages and attorneys= fees and costs of suit incurred herein.

NINTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress – Against All Individually Named Defendants)

173. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

174. By engaging in the acts alleged herein, the defendants engaged in outrageous conduct that was intended to cause plaintiff to suffer emotional distress or engaged in the conduct with a reckless disregard of the probability of causing plaintiff to suffer emotional distress.

175. As a direct, proximate and foreseeable result, plaintiff suffered sever emotional distress and the outrageous conduct was the cause of the emotional distress suffered by plaintiff.

176. The conduct of defendants also amounts to oppression, fraud or malice within the meaning of Civil Code section 3294, *et seq.* and punitive damages should be

assessed against each defendant for the purpose of punishment and for the sake of example.

TENTH CAUSE OF ACTION

(Negligent Infliction of Emotional Distress – Against All Individually Named Defendants)

177. Plaintiff realleges all prior paragraphs of this complaint and incorporate the same herein by this reference as if those paragraphs were set forth in full herein.

178. By engaging in the acts alleged herein, the defendants engaged in negligent conduct and a willful violation of the laws of the State of California causing plaintiff to suffer serious emotional distress.

179. As a direct, proximate and foreseeable result, plaintiff suffered serious emotional distress and the outrageous conduct was the cause of the emotional distress suffered by plaintiff.

PRAYER

WHEREFORE, plaintiff prays for judgment as follows:

As to the First Cause of Action – Violation of Civil Rights – 42 U.S.C. 1983:

1. For special damages according to proof;
2. For general damages according to proof;
3. For prejudgment interest according to law;
4. For attorneys' fees pursuant to code;

5. For costs of this suit incurred herein; and

6. For such other and further relief, including injunctive relief, as this Court deems just and proper.

As to the Second Cause of Action – Conspiracy to Violate Civil Rights – 42 U.S.C. 1983:

1. For special damages according to proof;

2. For general damages according to proof;

3. For prejudgment interest according to law;

4. For attorneys' fees pursuant to code;

5. For costs of this suit incurred herein; and

6. For such other and further relief, including injunctive relief, as this Court deems just and proper.

As to Third Cause of Action – Negligent Hiring, Retention and Promotion:

1. For special damages according to proof;

2. For general damages according to proof;

3. For prejudgment interest according to law;

4. For costs of this suit incurred herein; and

5. For such other and further relief, including injunctive relief, as this Court deems just and proper.

As to Fourth Cause of Action – Negligent Supervision:

1. For special damages according to proof;

2. For general damages according to proof;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As to The Fifth Cause Of Action – Aiding and Abetting:

1. For special damages according to proof;

2. For general damages according to proof;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As to The Sixth Cause Of Action – Aiding and Abetting:

1. For special damages according to proof;

2. For general damages according to proof;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As To The Seventh Cause Of Action – Civil Rights Violation [CC § 52.1]

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For punitive damages according to proof at the time of trial;

4. For attorneys' fees and costs of suit;

5. For prejudgment interest;

6. For civil penalties pursuant to statute; and

7. For any other relief this Court deems just and proper.

As to the Eighth Cause Of Action – Conspiracy to Violate CC § 52.1

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For punitive damages according to proof at the time of trial;

4. For attorneys' fees and costs of suit,

5. For prejudgment interest;

6. For civil penalties pursuant to statute; and

7. For any other relief this Court deems just and proper.

As to the Ninth Cause Of Action – Intentional Infliction of Emotional Distress:

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

As to the Tenth Cause Of Action – Negligent Infliction of Emotional Distress:

1. For general damages according to proof at the time of trial including pain and suffering and emotional distress;

2. For special damages according to proof at the time of trial;

3. For costs of suit;

4. For prejudgment interest; and

5. For any other relief this Court deems just and proper.

Dated: August 24, 2001

HOSEY & BAHRAMBEYGUI

By: /s/ Patrick L. Hosey
Patrick L. Hosey
Attorneys for Plaintiff
DAVID GENZLER

Supreme Court U.S.
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No. 05-300

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2005

PETER LONGANBACH, an individual; JEFFREY O'BRIEN, an individual; GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity; and DOES 1 through 100, inclusive,

Petitioners,

v.

DAVID GENZLER,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF SAN DIEGO COUNTY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing as the authorized law officer of the county, and on behalf of the California District Attorneys Association pursuant to Supreme Court Rule 37, subdivision 4.[1]

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1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board or Commission.

It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall

INTEREST OF AMICUS CURIAE

The District Attorney of Los Angeles County and his fifty-seven (57) fellow elected district attorneys in California believe that the Ninth Circuit reached an erroneous decision in this case. The Ninth Circuit's opinion is in direct conflict with other Circuit Courts. If the law as set forth in this decision is allowed to stand, California prosecutors will no longer be accorded absolute immunity when they interview victims and witnesses. Moreover, California prosecutors will unnecessarily face unjust civil litigation for conscientiously performing their duties.

Prosecutors routinely interview victims and witnesses in sexual assault cases, child molestation cases, domestic violence cases, and gang cases after a defendant has been arrested. Seasoned prosecutors assigned to these cases must pose challenging and often confrontational questions to witnesses in order to independently gauge the credibility of witnesses and to prepare them at an early stage for the cross-examination our adversarial process employs to test for the truth. This usually means confronting them with conflicting details and assessing whether there is a reasonable explanation for the conflicts. Occasionally after these interviews the prosecutor in the exercise of his discretion completely rejects or substantially alters the charges originally sought by the police.

The prosecutor's role in these interviews is not investigatory. Prosecutors are not seeking to find clues and build a case against unnamed persons where there is no probable cause to arrest. These are cases where probable cause to arrest has already been established and an independent determination must be made that a case can be proven beyond a

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> attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Government Code section 26500. (West 1998).

The California District Attorneys Association is a California prosecutorial organization counting among its 2400 members, all of the 58 elected District Attorneys in California. CDAA's Appellate Committee takes a proactive stance on matters of statewide concern to prosecutors.

reasonable doubt. The suspects and the witnesses deserve our independent professional judgment. Prosecutors have traditionally been accorded absolute immunity from civil liability in order fairly to accomplish this responsibility. We are advocates vigorously attempting to achieve justice, which means talking to witnesses accompanied by an investigator who prepares written reports which are required to be disclosed to defense counsel. These additional reports often assist defense counsel in gathering information in preparation for their defense and cross-examination. Specialized prosecutions will be severely compromised if the skilled advocates' role in victim and witness interviews will subject the prosecutors to civil lawsuits. The Ninth Circuit's misinterpretation reflects existing conflicts between the Circuits as well as a major discrepancy within the Ninth Circuit and state cases in California. and the erroneous interpretation by the Ninth Circuit in this case.

SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly characterized the interviews conducted by DA Investigator O'Brien and DDA Longanbach as investigatory in nature in a results-oriented analysis. Apparently Genzler's allegations that O'Brien and Longanbach suborned perjury during these interviews was enough for the Ninth Circuit to alter the definition of an advocatory function. It is conceded by the Ninth Circuit that these interviews occurred after probable cause existed to arrest Genzler and that the interviews were at least partially intended to prepare for the preliminary hearing and trial. The erroneous redefinition of clear advocacy functions is largely attributable to an overbroad interpretation of footnote 5 in *Buckley v. Fitzsimmons* 509 U.S. 259 (1993) and is in conflict with other Circuits that have addressed the same issue after *Buckley*. The disregard for the existence of probable cause in the Ninth Circuit's opinion undermines this Court's attempt to foster a "bright-line" analysis in *Buckley*.

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ARGUMENT

I. CONFLICTING CIRCUIT COURT OPINIONS REQUIRE A GRANT OF CERTIORARI

This Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* 424 U.S. 409, 430, (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler v. Pachtman, supra,* 424 U.S. at 430; *Malley v. Briggs* 475 U.S. 335, 342 (1986); *Burns v. Reed* 500 U.S. 478, 486 (1991); *Buckley v. Fitzsimmons* 509 U.S. 259, 269-270, (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns v. Reed,* 500 U.S. at 486; *Buckley v. Fitzsimmons,* 509 U.S. at 269-270.

The function test as applied in *Buckley,* created a bright-line rule intended to determine when prosecutorial actions are actions of an investigator or an advocate. If interviews are held before probable cause to arrest has been established, they are presumed to be investigative and akin to police work. After probable cause to arrest has been determined to exist, the interviews are more likely to be those of an advocate. However, in footnote 5 of the *Buckley* decision, this Court opened the door to characterizing post probable cause activities as investigative also.[2]

In the *Buckley* dissent, Justice Kennedy predicted problems which would be generated by the majority opinion.

> In recognizing a distinction between advocacy and investigation, the functional approach requires the

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[2] n5 Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, as the opinion dissenting in part points out, post, at 290, a prosecutor may engage in "police investigative work" that is entitled to only qualified immunity.
Buckley v. Fitzsimmons, 509 U.S. at p. 270 n.5 (U.S. 1993)

> drawing of difficult and subtle distinctions, and I understand the necessity for a workable standard in this area. But the rule the Court adopts has created more problems than it has solved.

Buckley v. Fitzsimmons, 509 U.S. at 288-291 (U.S. 1993)

Determining if a prosecutor acted as a prosecutor/investigator or prosecutor/lawyer does not resemble a "simple limitation" every court can apply but a subtle interpretation that will differ with every court.

Confusion after *Buckley* has proliferated as conflicting interpretations of the dividing bright-line between investigative actions and advocacy have been generated among the different circuits.

When faced with similar issues of absolute immunity as the instant case, the Fifth Circuit came to an opposite conclusion. In *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), Jordan the prosecutor, was alleged to have coerced Rowell, a relative of the defendant Cousin, to lie under oath.

> The record therefore demonstrates that, at the time of Jordan's (and of Simino's) conversations with Rowell, in which Jordan allegedly told Rowell to implicate Cousin falsely in the murder and coached him on how to testify, Jordan was acting as an advocate rather than as an investigator. The interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause. Jordan therefore is entitled to absolute immunity with respect to this claim.

Id. at p.635 (footnote omitted)

The Fifth Circuit interpreted Buckley and decided that prosecutor Jordan, merited absolute immunity despite the allegations that he coerced Rowell to lie during an interview when he coached him on how to testify.

> Although *Buckley* did not explicitly hold that all witness interviews conducted after indictment are advocatory in nature, the Court's reasoning strongly indicates that many, perhaps most, such interviews

> are likely to be advocatory rather than investigative.

Cousin v. Small, 325 F.3d at 633

In another Fifth Circuit post-*Buckley* decision addressing similar facts, absolute immunity was accorded to the prosecutor when accused of coercing witnesses.

> Brandley asserts that Keeshan knew of and probably directed the intimidation of witnesses and suppression of other important evidence. The district court found that actions taken by Keeshan were part of his efforts to prepare the State's case for trial and that such acts were wholly within the scope of his judicial function, citing *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (finding absolute immunity from liability even where a prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony.) Taking Brandley's allegations as true, we hold that Keeshan retained his absolute immunity from suit.

Brandley v. Keeshan, 64 F.3d 196, 201-202 (5th Cir. 1995)

The Fourth Circuit has also addressed this issue and reached a conclusion inconsistent with the challenged opinion.

> Clearly, some evidentiary review is necessary to determine whether to pursue charges, and a prosecutor is held to be absolutely immune from liability for performing such duties. Seigel's duties as a peer reviewer were *analogous to those of a prosecutor reviewing the evidence to determine whether to recommend prosecution.*

Ostrzenski v. Seigel, 177 F.3d 245, 250 (4th Cir. 1999) (emphasis added) (Citations omitted)

In a separate case, the Fourth Circuit interpreted the bright-line demarcation in *Buckley* to refer to the date of the arrest and employed the pre-existing *Imbler-Burns* functional determination for any act falling on the judicial-process side of

the *Buckley* bright-line. The Fourth Circuit commented on *Buckley* before finding absolute immunity for the prosecutors in *Carter v. Burch*, 34 F.3d 257, 262 (4th Cir. 1994)

> In addition, the Court noted that the alleged fabrication of evidence occurred before an arrest, and thus before the judicial process had been implicated.

Ibid.(Citations omitted).

There have been conflicting approaches in the district courts as well.

> Prosecuting attorneys are absolutely immune from suit under § 1983 for decisions to prosecute; and for any related investigatory or evidence gathering functions undertaken in connection with the prosecutorial function. There is no serious debate that Thuston's decision to prosecute Pennington, as well as his actions taken to initiate and pursue this prosecution, are protected by absolute immunity. The court will not reduce all of Thuston's actions to an investigator or a mere complaining witness only because he paid a single visit to the plaintiff's property. Instead, the circumstances surrounding his one visit to the property demonstrate that Thuston went there simply to perform investigatory or evidence-gathering functions related to his "preparation for the initiation of a prosecution or for judicial proceeding." See *Buckley*, 509 U.S. at 273. As alleged in the complaint, Thuston only visited the property after having seen the videotape, having decided that prosecutorial action was appropriate, and having directed others to take the necessary steps in pursuit of that prosecution and in protection of the herd. "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Id.* Because

> Thuston already had been provided the cause and grounds to initiate the prosecution based on the videotape, his mission in visiting the property was not as an investigator but as an advocate. *Id.* at 274.

Pennington v. Penner, 207 F. Supp. 2d 1225, 1235 (D. Kan. 2002)(Citations omitted).

In a *Bivens*[3] lawsuit for malicious prosecution, the DC Circuit found that the federal prosecutors lost their absolute immunity under rather extraordinary facts:

> In the two complaints Moore alleged that Valder and the postal inspectors maliciously prosecuted him, even though they knew that he was unaware of the fraud, based on his and REI's criticism of USPS procurement policies and on his recommendations to the President of qualified candidates for Postmaster General. In addition, Moore alleged other misconduct, including claims that Valder told several postal inspectors in the presence of a grand jury witness that he did not care whether Moore was in fact guilty because he wanted to secure a "high-profile" indictment to further his career; that Valder and the postal inspectors intimidated and coerced witnesses into changing their testimony to incriminate Moore; that they concealed evidence of Moore's innocence; that they manipulated witness testimony and presented to the grand jury false, incomplete and misleading written witness statements; that they lost, destroyed or concealed from the grand jury exculpatory information; that they disclosed grand jury testimony to third parties; and that Valder withheld material exculpatory information from Moore after indictment.

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[3] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (U.S. 1971) which generated a class of lawsuits similar to § 1983 claims. These two types of lawsuits differ in that a § 1983 claim redresses the violation of a federally or constitutionally protected right by a government agent acting "under color of state law," whereas a *Bivens* action vindicates the deprivation of a right by an official acting "under color of federal law."

Moore v. Valder, 65 F.3d 189, 211-214 (D.C. Cir. 1995)

The D.C. Circuit, like the challenged opinion, concluded that intimidating and coercing witnesses was not advocatory no matter when it may occur.

> Valder, however, has not met his burden of establishing that absolute immunity protects him from potential liability for the other instances of misconduct alleged by Moore. Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution.

Moore v. Valder, 314 U.S. App. D.C. 209 (D.C. Cir. 1995)

This results-oriented approach does not comport with *Imbler* or *Buckley*, but seemingly has occurred as the result of an overbroad interpretation of footnote 5 in *Buckley*. This interpretation completely ignores probable cause.

II. THE NINTH CIRCUIT IS WRONG IN ITS ANALYSIS OF ABSOLUTE IMMUNITY

The prosecutor in this case did not go beyond the bounds of his advocacy role despite implications in the challenged opinion which suggests otherwise.[4] There is nothing in the record to suggest that Longanbach or O'Brien knew that the interviews were not related to the advocate's role in the presentation of evidence at a preliminary hearing scheduled for a future date. A

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[4] At this time, the preliminary hearing at which the judge would decide whether there was probable cause to hold Genzler for trial in superior court was still over a month away.
Genzler v. Longanbach, 410 F.3d 630, 640 (9th Cir. 2005)
When Longanbach and O'Brien met with Flanders, the preliminary hearing at which the court would determine whether there was probable cause for Genzler to stand trial was still more than three weeks away.
Genzler v. Longanbach, 410 F.3d at 642

prosecutor should speak to a witness early in the process in order to determine what charges to file, to assess the witness' credibility and to allow the DA investigator to prepare a report of the interview to disclose to the defense. The prosecutor, charged with seeking justice, *Berger v. United States* 295 U.S. 78, 88 (1935), protects both society and the accused by review, preparation and advocacy at all stages of a criminal prosecution.

The Ninth Circuit was wrong in its interpretation of *Buckley*, partly due to a misunderstanding of criminal procedure in California. It was stipulated below that the defendant, Genzler, had been arrested based on sufficient probable cause when all the interviews occurred in this case. The Ninth Circuit repeatedly points out in the challenged opinion that DDA Longanbach and DA Investigator O'Brien's interview of Flanders after the complaint was filed occurred more than a month before the preliminary hearing. The inference intended by the court is that the interview was not useful in preparing for a preliminary hearing which was weeks away. A trial deputy must prepare for a preliminary hearing which usually occurs within 10 court days. There is no indication that the prosecutor knew in advance of the interview that the preliminary hearing would not occur within ten court days, the statutorily mandated time for such a hearing when a defendant is in custody. Cal. Penal Code §859b.(West 2003) A prosecutor assigned to a complex case cannot afford to wait to interview witnesses on the assumption that defense counsel will request a continuance.

It was stipulated in the lower court, that when all the interviews occurred, probable cause already existed to arrest Genzler. Thus, the interviews would appear to be on the advocacy side of the bright-line described in *Buckley*.

> We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity. We noted in particular that an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity

> because it was "fairly within [the prosecutor's] function as an advocate."

Buckley v. Fitzsimmons, 509 U.S. 259, 273-274 (1993)(Citations omitted.)

The challenged opinion also mischaracterized DA Investigator O'Brien's initial interview of Flanders as investigatory partly because it may have occurred after Genzler was arrested, again based on sufficient probable cause and before the complaint was filed. Genzler was in custody and had given a statement to the police when O'Brien proceeded to interview Flanders. This interview may have occurred before the complaint was filed, but it was held after she gave a video-taped statement to the police. It did not advance the police investigation at that stage to re-interview Flanders. The Ninth Circuit's mistaken view was based partly on the fact that O'Brien was accompanied by the Detective investigating the murder. O'Brien was conducting his interview at the request of the trial deputy. He was not seeking new clues to arrest new suspects. O'Brien was interviewing a percipient witness with the assistance of someone presumably knowledgeable about the case and the parties; someone familiar to the witness who could spot discrepancies or inconsistencies and point them out to O'Brien immediately. His presence assisted O'Brien and Longanbach in assessing the witness' statements for charging and trial preparation. The charging process had begun and a decision had to be made whether the offense was a murder, manslaughter or no offense at all due to the possibility of self-defense. The presence of an extra witness at an interview is often desirable if the need arises to present testimony for impeachment purposes. If O'Brien had been sick, injured, on vacation or dead, the statement could have been presented through the detective.

While the prosecutor's actions in this case should be accorded absolute immunity based on the analysis in *Buckley*, it is equally important for the Court to clarify *Buckley's* "bright-line" analysis in conjunction with footnote 5 of that opinion to encompass absolute immunity for interviews of witnesses and victims in preparation for complaint filing and preliminary

hearings. To do otherwise will reduce veteran prosecutors to a passive role subordinate to police officers.

As footnote 5 of *Buckley* indicates, post-probable cause activity does not insulate the prosecutor if the activities are investigative in function. In this case, the interviews were alleged, by Genzler, to be coercive in attempting to encourage Flanders to shift her testimony to assist in convicting Genzler. They were not alleged to be investigative. Overzealous questioning either in preparation for a trial or a hearing is entitled to absolute immunity. *Lee v. Willins*, 617 F.2d 320 (2d Cir. 1980), *Cousin v. Small*, 325 F.3d 627, *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978)

CONFLICTING OPINIONS WITHIN THE NINTH CIRCUIT

In *Broam v. Bogan*, 320 F.3d 1023 (2003), the Ninth Circuit closely examined the chronology of when probable cause existed to arrest the defendant before determining initially if absolute immunity applied.

> A more detailed statement of the facts with indications of whether they occurred before arrest on these charges would enable the court to make a determination of whether the complaint states one or more claims for relief.

Broam v. Bogan, 320 F.3d at 1029

This request for a chronology would have been unnecessary in the challenged opinion because it was stipulated below that probable cause existed to arrest Genzler before the interviews in question occurred.

> To determine whether a state law enforcement officer or a prosecutor is entitled to qualified, as opposed to absolute, immunity a court must decide whether the alleged unconstitutional conduct occurred during the performance of an investigative function. Examples of when a law enforcement officer performs an investigative function include gathering physical evidence and conducting interrogations to determine whether a crime has

> been committed and whether probable cause exists to arrest a suspect.

Broam v. Bogan, 320 F.3d at1031

Recognizing that some investigative acts could occur after probable cause was established as in footnote 5 of *Buckley*, the Ninth Circuit described some purely investigative acts based on an *Imbler* function test.

> However, even after the initiation of criminal proceedings, a prosecutor may receive only qualified immunity when acting in a capacity that is exclusively investigatory or administrative. See, e.g., *Buckley*, 509 U.S. at 274 n.5 (stating that "of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, as the opinion dissenting in part, points out, a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity") (citation omitted); *Guzman-Rivera v. Rivera-Cruz,* 55 F.3d 26, 28 (1st Cir. 1995) (holding that the prosecutors were not "entitled to absolute immunity for any delays or inadequacies in their conduct of the investigation" after § 1983 plaintiff had been convicted, but that "they [were] absolutely immune for their post-investigation failure to go into court to seek Guzman's release"); *Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992) (holding that when prosecutors who, after conviction of criminal defendant, acting solely as investigators, acquired and withheld exculpatory evidence after their role in the prosecution had ended are "not entitled to any more immunity than the defendant police officers"); *Robichaud v. Ronan*, 351 F.2d 533, 535 (9th Cir. 1965) (holding that prosecutors who, soon after arrest of suspect, allegedly directed police to coerce confession from suspect, were not entitled to absolute immunity because interrogation is ordinarily a police activity).

Broam v. Bogan, 320 F.3d at 1031

Another case, *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004), which conflicts with the challenged opinion was decided by the Ninth Circuit itself. A search warrant was conducted at the request of the prosecutors after the indictment, before trial, in an attempt to gather new evidence in the existing case and seek evidence of new crimes.

> The Supreme Court has not addressed whether a prosecutor is entitled to absolute immunity when assisting with the acquisition of evidence pursuant to a post-indictment search warrant. We have concluded, however, that "prosecutors are absolutely immune from liability for gathering additional evidence after probable cause is established or criminal proceedings have begun when they are performing a quasi-judicial function." *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003). The existence of probable cause at the time of the prosecutor's alleged unconstitutional conduct must be considered because "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274 (footnote omitted). However, a prosecutor can still perform "police investigative work" after probable cause has been established, for which only qualified immunity would apply. *Id.* at 274 n.5; see also *Imbler*, 424 U.S. at 431 n.33; *Broam*, 320 F.3d at 1031. Thus, the timing of the prosecutor's conduct informs our determination of the function performed, but it is not determinative. See *Cousin v. Small*, 325 F.3d 627, 636 (5th Cir. 2003) ("What Cousin fails to acknowledge, however, is that the timing of events, while not determinative, can be highly relevant to the inquiry into function." (footnote omitted)).
>
> Here, the second search warrant had two goals: it sought evidence to prosecute the pending

> indictment against Womack, and it sought to investigate and uncover new crimes.

KRL v. Moore, 384 F.3d at, 1111

Because one of the goals in *KRL* was to prepare for trial in the pending case, absolute immunity was deemed appropriate due to its advocacy nature. One of the acknowledged goals was also to seek evidence for additional counts but the advocacy role was preserved. In the challenged opinion, the Ninth Circuit conceded the advocacy roles of the interviews also but inexplicably rejected absolute immunity in a case where no new charges were being sought.

> We recognize that the two meetings with Flanders described *here were to some degree related to trial preparation,* even when viewed in the light most favorable to Genzler.

Genzler v. Longanbach, 410 F.3d 630, 643 (emphasis added)

As noted in the following section, the California Court of Appeals addressed the same issue as the Ninth Circuit and reached an opposite conclusion.

> "...Preparing to initiate a prosecution may necessitate obtaining, reviewing and evaluating evidence; absolute immunity may attach when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court.'". Accordingly, a prosecutor enjoys absolute immunity from civil suit for such conduct.

Falls v. Superior Court, 42 Cal. App. 4th 1031,1046 (Cal. Ct. App. 1996) citing *Gensburg v. Miller*, 31 Cal. App. 4th 512, 523 (Cal.Ct.App. 1994)

It should be emphasized that in the challenged opinion, all of the actions by O'Brien and Longanbach occurred after it was stipulated that probable cause existed to charge Genzler.

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III. THE NINTH CIRCUIT'S CHALLENGED OPINION WILL NEGATIVELY IMPACT THE CRIMINAL JUSTICE SYSTEM AT EVERY LEVEL

Buckley as interpreted by California state courts provides absolute immunity for prosecutors interviewing witnesses in preparation for preliminary hearings or trial. Witness interviews, even at the pre-complaint stage, have always been construed as an essential part of the advocate's function.

> We hold that a prosecutor acts within his official capacity when he subpoenas a witness or prepares for a postcharging hearing, such as a preliminary hearing, by interviewing a witness and encouraging the witness to testify. (See *Buckley v. Fitzsimmons, supra,* 509 U.S. 259, 272-273 [125 L. Ed. 2d 209, 226] ["We expressly stated [in *Imbler v. Pachtman*] that 'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity [Citation] We noted in particular that an out-of-court 'effort to control the presentation of [a] witness' testimony' was entitled to absolute immunity because it was 'fairly within [the prosecutor's] function as an advocate.' . . . We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity."]; *McMartin v. Children's Institute International, supra*, 212 Cal. App. 3d 1393 [child care custodians interviewed possible victims of sexual molestation prior to charges being filed]; *Fisher v. Pickens, supra*, 225 Cal. App. 3d 708 [probate court investigator interviewed witnesses and gathered evidence in a conservatorship matter]; *Williams v. Hartje, supra*, 827 F.2d 1203 [in preparation for a coroner's

> inquest a prosecutor interviewed a jail inmate to discourage his testimony]; *Marx v. Gumbinner, supra,* 855 F.2d 783 [precharging, a prosecutor interviewed a four-year-old suspected rape victim]; *Howard v. Drapkin, supra*, 222 Cal. App. 3d 843 [in a family law dispute, a psychologist interviewed a spouse for six hours]; *Gensburg v. Miller, supra*, 31 Cal. App. 4th 512, 523

Falls v. Superior Court, 42 Cal. App. 4th at 1045-1046

Interviewing witnesses in preparation for filing a complaint is crucial in determining whether to file charges and what charges to file.

> The decision of whether or not to charge involves a delicate balancing of, not only the facts of a given case that inform the issue of probable cause, but also a number of policy considerations, such as the heinousness of the crime, the criminal records, if any, of the suspect, the likelihood of sustaining the government's burden at trial, and the amount of resources that the prosecutor will have to devote to this particular case, see generally Uviller, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the A.B.A., 71 Mich.L.Rev. 1145 (1973); Davis, Discretionary Justice (1969). Our criminal justice system has seen fit to leave these difficult decisions in the purview of the public prosecutor, and thereby entrusts in him a tremendous power to adversely affect the lives of our citizenry. This system contemplates that persons who will ultimately be found innocent of wrongdoing will nonetheless be forced to defend themselves against criminal charges, and thereby incur substantial expenses and damage to their reputations, even if acquitted. It is the recognition of this power which we entrust in the prosecutor, with its concomitant potential for arousing the wrath of persons who feel that they have been wrongly charged, that has compelled the courts to

> confer absolute immunity upon prosecutors for their activities in this sphere.

Schieb v. Humane Soc. of Huron Valley, 582 F. Supp. 717, 722-723 (D. Mich. 1984)

Prosecutors should not be subject to vexatious litigation any time they interview a witness. Such exposure may compel prosecutors to forego witness interviews. Such abstention would certainly eliminate exposure to civil litigation. The cautious prosecutor would instead rely on police accounts of interviews in making a filing decision. Witnesses would not be challenged by the careful questioning of experienced prosecutors and potentially innocent persons would be subject to prosecution. The criminal justice system would thereby be seriously compromised. As this Court has correctly noted:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. Cf. American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function § 3.9 (c) (Approved Draft 1971).

Imbler v. Pachtman, 424 U.S. at 426, n.24

The traditional role of an advocate requires that witnesses be interviewed.

> Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses

State v. Earp, 319 Md. 156, 162, 571 A.2d 1227. (1990)

Interviewing victims has consistently been recognized in federal courts as crucial to the criminal justice system,

> We begin with the observation that to grant a prosecutor absolute immunity for the decisions to initiate and pursue a prosecution while subjecting him to liability for action taken to secure the information necessary to make those decisions

> "would only foster uninformed decision making and needless actions." *Forsyth v. Kleindienst,* 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913, 101 S. Ct. 3147, 69 L. Ed. 2d 997 (1981). Our own court has held that "a prosecutor is entitled to absolute immunity for the factual investigation necessary to prepare a case." *Mullinax v. McElhenney,* 817 F.2d 711, 715 (11th Cir. 1987). Such investigation, we have held, includes interviewing witnesses before presenting them to the grand jury. See *Cook v. Houston Post,* 616 F.2d 791, 793 (5th Cir. 1980). *Surely, it also includes interviewing the victim of the crime.*

Marx v. Gumbinner, 855 F.2d 783, 792 (11th Cir. 1988) (emphasis added)

Thus an important function protecting all parties, particularly the accused, would be discarded as an unintended consequence of the challenged opinion.

> A hallmark of effective judicial process is the care taken to ensure that nobody is erroneously charged, arrested, or incarcerated.

Rivera v. Leal, 359 F.3d 1350, 1354 (11th Cir. 2004)

> In this way, Buckley's proffered standard would have the perverse effect of encouraging, rather than penalizing, carelessness, and *it would discourage early participation by prosecutors in the criminal justice process.*

Buckley v. Fitzsimmons, 509 U.S. at 283 (Kennedy, J. dissenting) (emphasis added) (citations omitted)

Granting certiorari in this petition would allow this Court to rectify the error in the challenged opinion. More importantly, this is an opportunity to clarify the importance of attaching absolute immunity to the prosecutor's role in interviewing witnesses in preparation for any prosecutorial function after probable cause to arrest has attached.

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CONCLUSION

Footnote 5 of the *Buckley* decision has left the door open to a results-based analysis whenever a former defendant alleges in his pleadings that a prosecutor suborned perjury during witness interviews. The desire to right a perceived egregious wrong has driven the Ninth Circuit to redefine interviews, after probable cause is conceded to exist, as investigative. Any party who suborns perjury, including prosecutors, is guilty of a felony and should be prosecuted. Removing absolute immunity from all conscientious prosecutors conducting witness interviews will not eliminate this crime but will severely diminish prosecutorial discretion at a critical stage of a criminal prosecution.

For the reasons stated above, amicus urges this Court to grant prosecutors absolute immunity for interviewing witnesses in a prosecutorial function after probable cause to arrest has attached, and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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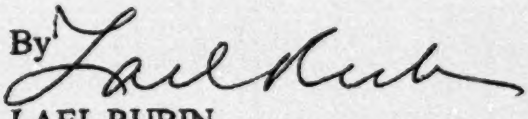
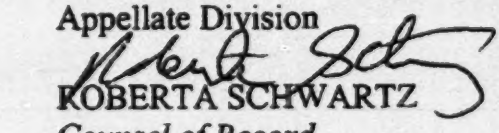
By 

LAEL RUBIN
Head Deputy District Attorney
Appellate Division



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